

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,094

WILFRED L. MILLER, et al.

Appellants

VS.

**THE PENNSYLVANIA RAILROAD COMPANY,
a corporation**

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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District of Columbia Circuit
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(i)

STATEMENT OF QUESTIONS PRESENTED

A train, under good visibility conditions, collided with plaintiffs' tractor-trailer which had become "hung up" on a grade crossing guarded by defendant's watchman, who had signalled plaintiff to cross about a minute or two before, and who failed to use available devices to warn the train of the stuck tractor-trailer. The questions are:

1. Whether the trial court erred in directing a verdict at the close of plaintiffs' case in chief on the theory of no negligence as a matter of law; and
2. Whether plaintiffs have thereby been denied their constitutional right of trial by jury.

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UNITED STATES COURT OF APPEALS

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**APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal in an action for property damage from a judgment of the United States District Court for the District of Columbia entered May 31, 1957, on a directed verdict at the close of plaintiffs' (appellants') case in chief.

Notice of Appeal was filed July 18, 1957. Jurisdiction of this appeal is granted by 28 U.S.C. 1291.

STATEMENT OF THE CASE

A. In General

1. The Proceedings Below

This is an action for property damage and losses arising from a collision on January 25, 1955, when defendant's train struck and damaged excavation equipment attempting to traverse a grade crossing attended by defendant's watchman. Plaintiff, Wilfred L. Miller, the owner of part of the equipment, filed a complaint below alleging negligence against the defendant railroad and seeking damages. The defendant denied any negligence and counterclaimed for property damage to its equipment. Alban Tractor Co., Inc. was granted leave to intervene as a plaintiff for losses it sustained as the conditional vendor of a bulldozer which was part of the equipment destroyed in the collision.

At trial, after plaintiffs rested in chief, the trial judge granted a motion for a directed verdict on the ground that plaintiffs had failed to make out a prima facie case of negligence against the defendant. Plaintiffs filed separate motions for a new trial, which were both denied. This appeal followed.

2. Summary of Events Eventuating in Collision

Plaintiff, Wilfred L. Miller, is a grading and excavating contractor in the greater Washington, D. C. area (J. A. 19). On January 25, 1955, he personally attempted to move certain grading and excavating equipment from Ardmore, Maryland to another job site in nearby Maryland. This equipment consisted of a bulldozer, which was loaded on top of a "low-boy" trailer, and an earth-scraper or pan, which was connected to the trailer, all of which was being pulled by a truck-tractor (J. A. 20-22). (For a picture of a similar rig, see Pl. Ex. 4). Driving his equipment in a westerly direction

on Lanham Station Road, Miller approached defendant's railroad grade crossing at Lanham, Maryland at about 5:15 p.m. (J. A. 24). Weather and light conditions were "very good" at the time (J. A. 24, 56).

When the equipment was about 150-200 feet from the crossing, Miller saw defendant's watchman standing on the crossing and signalling him to stop (J. A. 24). Miller immediately brought his equipment to a stop, and a train then passed over the crossing heading north, in the direction of Baltimore, Maryland (J. A. 25). The watchman then waved Miller to come on, and Mr. Miller drove his equipment down to the tracks and came to another stop, looking up and down the tracks for trains. The watchman then motioned for Mr. Miller to proceed again (J. A. 26). Miller moved his equipment forward to cross the three railroad tracks, but when the tractor-truck, which was pulling the equipment had cleared the tracks, the bottom of the trailer became "hung up" or wedged on the crossing due to a "hump" or "super-elevation" created by the crossing (J. A. 26). As Miller described it, ". . . the bottom of the trailer became lodged on the bed of the road" (J. A. 26). An independent witness, Mr. Stancliff, corroborated this, stating: "As his tractor came off the crossing and went down the hill his lowboy settled down on top of the knoll of the crossing and at that time he tried to go forward; he tried to go backward and he couldn't move it" (J. A. 53). This evidence was uncontradicted.¹

Miller then unsuccessfully attempted to dislodge the wedged trailer, and remove his bulldozer from the trailer (J. A. 27-28). About 40-50 seconds after his equipment became stuck or wedged on the crossing, a buzzer sounded in the nearby watchman's shack, signalling the approach of a train, at which time the watchman "seemed to

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But compare the trial court's statement to the jury that: "The evidence shows that if the engine of the plaintiff's apparatus did not get stalled on the track, the apparatus would have cleared the tracks before the train approached the intersection . . ." (J.A. 77 ; emphasis supplied); and, again, at the hearing on the motion for new trial: "He /the engineer/ had no reason for assuming that they were stalled". (J.A. 81; emphasis supplied.)

throw up his hands and become panic-stricken" (J. A. 28). The watchman ran to his shed, took a flag and ran up the railroad track in the direction of Baltimore. Miller and his assistant, Lindsay, stayed on the equipment attempting to wave the train down, jumping to safety just before the impact (J. A. 28-29). The southbound train did not slow down, but tore through the Miller equipment, scattering it in different directions (J. A. 29).

B. Evidence Relating to the Negligent Construction and Maintenance of the Grade Crossing

The trial judge took judicial notice of Section 38 of Article 89B of the Maryland Code, which provides in part that at a grade crossing, the railroad is required to keep its own road bed and the bed of the highway in proper repair; ". . . and the tracks of such railroads. . . shall be so constructed as to give absolutely safe and easy approach to and crossing thereof; . . ." Plaintiff Miller described the condition of the crossing upon which the bottom of his trailer became lodged as a "hump" or "super-elevation" (J. A. 26). The independent eyewitness, Stancliff, corroborated the defective condition of the crossing and its approaches, testifying as follows (J. A. 55):

"A The approach to the railroad is coming downhill and it continues to do so until you reach the railroad.

"Q You are speaking now in terms of the direction the truck was moving?

"A That is right. As you actually go on to the railroad, the first set of rails will slightly go uphill and then the second set of rails will go up a little further. The third set of rails will go up even further, at which time, after you get over the crossing it drops right off downhill again."

"Q Is the grade -- you know what I mean by grade, don't you?

"A Yes.

"Q From the point where you leave the tracks going in the direction from which you are coming -- in other words, this direction was coming in -- is the grade exactly constant or is it irregular?

"A Irregular.

"Q As you go down --

You have crossed the tracks and, going in the direction of the truck, does it tend to level up or does it drop down, or what?

"A It constantly drops off.

"Q Is it fair to say you get a sort of overall hump.

"A I would say so."

In addition, Stancliff testified (J. A. 54) that some four years prior to the trial (i. e., about two years before this accident), he had difficulty in traversing this same railroad crossing when the muffler on his automobile "dragged at a point on the crossing," which he marked on photographs of the crossing (Pl. Exs. 6 and 7).

Similarly, a truck driver, William B. Brown, testified that while attempting to use this same crossing several years before, a low-boy trailer which he was pulling with a truck tractor became "hung up" and was struck by a passing train (J. A. 60). He further testified that the contour and grade of the crossing were the same at the time of his accident as they were two weeks before the trial (J. A. 59-60). Additionally, photographs of the crossing introduced

as part of plaintiffs' case demonstrated the same "humped" condition about which all of the above witnesses testified.

C. Evidence Relating to the Negligence of the Grade Crossing Watchman

Miller testified that the grade crossing watchman waved him on to proceed through the crossing (J. A. 26), and 40-50 seconds later, Miller observed the defendant's train (J. A. 28) about 3/4 to 1 mile away (J. A. 30), coming at about 85 m.p.h. (J. A. 31). It was stipulated that this was a scheduled train approximately on schedule (J. A. 58). General Rule A of defendant's company rules requires that "Employees whose duties are in any way affected by the timetable must have a copy of the current timetable with them while on duty" (J. A. 61-62).

Miller further testified that the watchman "seemed to throw up his hands and become panic-stricken when he heard the buzzer go off and I believe he ran in the shed and grabbed a red flag and started to run up the left side of the railroad track" (J. A. 28). And again in answer to defense counsel's question (J. A. 41):

"Q And you say that the watchman panicked at that point?

"A I thought he did.

"Q What did he do that made you think he panicked?

"A Well, he seemed to wring his hands and just become terrified and from his outward appearance he seemed to me he was very stricken at the time.

"Q Did he not immediately start up the track with his red flag in the direction in which the train was coming?

"A He did not have his red flag with him. I think he run in the shack and got his red flags and then run up the tracks."²

² Note trial court's remark at hearing on motion for new trial: "He was panic-stricken. The testimony shows that. The court had that in mind" (J.A. 81).

The railroad's rules also require that "The signal appliances for each watchman will be a standard stop sign, a red lamp approved as standard for the purpose, a red flag, a white lamp, fuzees, a whistle, standard gate lamp for crossing gates where used" (J. A. 72), and further that "When the crossing is obstructed or unsafe for train movements [the crossing watchman] must use a red flag by day, a red light by night and when day signals cannot plainly be seen and when necessary, in addition, display lighted fuzees to stop movements on the track obstructed or unsafe" (J. A. 73; emphasis supplied). The watchman, Thomason, admitted he had fuzees available in his shed at the time of the accident (J. A. 65), and testified (J. A. 66):

"THE COURT: What is a fuzee?

"THE WITNESS: A fuzee is a round flare about 6 inches long that when ignited it gives off a glare.

"BY MR. BERNSTEIN:

"Q Gives off a tremendous red glare, doesn't it?

"A Yes. It is red.

"Q Gives off a very clear warning or danger signal when it is set off?

"A It is to indicate danger.

"Q It takes only a few moments to set off; isn't that correct?

"A Yes, sir, it takes a short time."

The watchman further testified that he had never lit a fuzee before (J. A. 67), that he did not know whether a fuzee would be more effective than a red flag at a long distance (J. A. 67), and, grudgingly, that it was possible that it would be a very effective way to give notice of danger or warning to a train (J. A. 67).

As to the "training" given him by the defendant on the use of fuzees, Thomason testified (J. A. 70):

"Q Were you ever, Mr. Witness, trained by the Pennsylvania Railroad in how to use these fuzees, how long it takes to light them and under what circumstances to use them?

"A I was qualified as a watchman.

"Q Were you ever trained by the Pennsylvania Railroad in how to use these fuzees?

"A I was qualified as a watchman; that is all I know.

"THE COURT: He has answered the question."

Finally, Rule 400-N-23 of the defendant railroad requires that the crossing watchman be responsible to see that proper permission is "secured to protect the movement of heavy machinery . . . across tracks at highway crossings" (J. A. 73).

D. Evidence Relating to the Negligence of the Train Crew

Miller (J. A. 24) and Stancliff (J. A. 56) both testified that weather and lighting conditions were "very good" at the time of the accident. Miller testified that he first saw the train when it was 3/4 to 1 mile away (J. A. 30). Hodges, the engine-man of the train, testified that he could have stopped his train in a little more than 1/2 mile (J. A. 64-65). Stancliff (J. A. 56), Lindsay (J. A. 47) and Miller (J. A. 29) all testified that they saw no sparks from the wheels of the engine or cars before impact, heard no screeching of brakes, and saw no apparent slowing down of the train before impact. Defense counsel stated that no speed tape was kept on this train (J. A. 31). Stancliff estimated the train's speed at 85-90 m.p.h. just before impact (J. A. 56-57), and Miller judged 85 m.p.h., giving his experience in judging high speeds while a tail gunner in the Air Force (J. A. 31, 42).³

³ On which the trial court remarked to the jury, "I wouldn't consider this sufficient evidence" (J.A. 31).

Commenting on the train crew's conduct, in denying plaintiff's motion for new trial, the trial judge said:

"I think the evidence was clear that this crossing could have been seen a half mile away or more than a half a mile away, and if the engineer half a mile away started to slow down the train he could have stopped before he reached the crossing and avoided the collision.

"But what motivated the Court was not that. He had a right to assume when a half mile away he saw this cavalcade, so to speak, these vehicles, that they would clear the intersection. He had no reason for assuming that they were stalled" (J. A. 81; see also J. A. 77-78).⁴

STATEMENT OF POINTS

1. The trial court erred in directing a verdict for defendant on the ground of the absence of proof of negligence in the face of substantial evidence thereof.

2. The trial court's excursion into the probative weight of the evidence and its construction, misconstruction, and evaluation of evidence under the guise of a determination as to its legal sufficiency on motion for a directed verdict constituted an unwarranted intrusion into the jury's exclusive province and a deprivation of plaintiffs' constitutional right to a jury trial.

3. The trial court erred in construing the evidence most favorably to the moving party instead of to the opposing party on motion for directed verdict.

4. The trial court erred in critical misstatements of what the evidence showed.

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The engineer had not testified in any manner as to his "assumptions" when he saw the Miller equipment. In fact, there was no showing, at this point, whether or not the engineer ever saw it.

SUMMARY OF ARGUMENT

I. On the evidence presented in plaintiffs' case, the jury unquestionably could have found that the defendant railroad was negligent in maintaining a public railroad grade crossing in an unsafe condition because of the existence of a "hump" or "knoll" thereon, which caused plaintiffs' excavating equipment to become "hung up", wedged or stuck on the crossing, and that the maintenance of the crossing in such condition was in violation of defendant's common law duty, as well as Section 38, Article 89B of the Maryland Code, which provides that such crossings shall be constructed so as to be "absolutely" safe.

II. The jury unquestionably could have also found that the crossing watchman, employed by the defendant, was negligent: (1) in waving the plaintiff onto the crossing, knowing the condition of the crossing and the imminency of the arrival of defendant's train; and (2) in losing his head and thereby failing to take proper, effective and available steps to warn the approaching train of the equipment blocking the crossing.

III. And last, though not least, the jury unquestionably could have concluded that defendant's train crew were negligent in failing to stop their train before it reached the crossing, as they admittedly had the ability to do, and thus have avoided the accident.

ARGUMENT

I. The Defendant Railroad Was Negligent In Failing To Construct And Maintain Its Grade Crossing In A "Safe and Convenient" Manner.

The statutory duty of the defendant railroad with respect to the construction and maintenance of its public crossings (referred to in Statement, p. 4 , supra), requires it to keep its own road-bed and the bed of the highway in proper repair;"and the tracks of such railroads . . . shall be so constructed as to give absolutely safe and easy

approach thereto and crossing thereof . . . " [Emphasis supplied].⁵ In addition to this "absolute" statutory duty, the common law duty of a railroad in Maryland with respect to the maintenance of its public crossing is crystallized in Contino, et al. v. Baltimore & Annapolis R. Co., 178 F.2d 521 (C.C.A. 4,1949). There, a tractor-trailer 12 feet high attempted to pass under a railroad overpass with a clearance of only 10 feet 10 inches, with obvious resultant damage to the trailer and its contents. The railroad was charged with negligent failure to post adequate warnings of the low clearance. In reversing a dismissal by the district court, the Court of Appeals said:

" . . . [I]t is the duty of every railroad company properly to construct and maintain crossings over all highways on its line in such manner that they shall be safe and convenient to travelers so far as it may be done without interfering with the safe operation of the road; and that as a general rule the duty of keeping a public crossing in repair is the same as the duty of construction and that a railroad company must keep its tracks and approaches in a condition fit to meet the demands of public travel." [Emphasis supplied.]

Here the evidence unequivocally established that plaintiff Miller's equipment became "hung up" or wedged on the grade crossing maintained by the defendant railroad because of the contour of the crossing.⁶ Stancliff, an eyewitness, described the process as one where the Miller equipment "settled down" on the "knoll" or "hump" (J. A. 53). It should be noted at this point that the evidence showed it was the low-boy trailer which became wedged on the crossing, and that the earth scraper or "pan" which was being towed by the trailer was flexible and

⁵ Since the accident occurred in Maryland, the substantive law of that State, referred to in the text, is, of course, controlling in this case. Tobin v. Pennsylvania Ry. Co., 69 App. D.C. 262, 100 F. 2d 435 (1938).

⁶ Notwithstanding this fact, the trial court, at two critical points -- first, while directing a verdict (J.A. 77), and, second, during argument on plaintiffs' motions for new trial (J.A. 81) -- referred to plaintiffs' "vehicles . . . were stalled." Nowhere in this record is there any evidence justifying such a conclusion. To the contrary, Miller (J.A. 27-28) and Stancliff (J.A. 53) both testified that after the Miller equipment "hung up" on the crossing, Miller used his engine to try and dislodge his equipment.

not rigid (J. A. 43), and was not involved in any way with the "wedging" of the trailer.

Considering the statutory and common law duty of the defendant railroad with respect to the maintenance and construction of its approaches and grade crossings, together with the undisputed fact that the Miller equipment became "hung up" on a "hump" on the defendant's crossing, an inference of negligence was created which the defendant railroad was bound to rebut. From the testimony of Stancliff and Miller, a jury of reasonable men certainly could have found that Miller's equipment became "hung up" because the tracks themselves were on an upgrade and the approach to the west of the crossing, the direction in which Miller was traveling, dropped off too sharply (J. A. 55); that when the front part of the equipment (the truck tractor) came down this sharp grade, the rear of the trailer was caused to wedge on the "hump" created by the upgrade of the tracks and the sharp downgrade of the western approach (J. A. 26); that this condition was caused by the negligent failure of the defendant railroad to properly maintain its crossing; and that the condition arising from this negligent failure was a proximate cause of the collision. A factual determination to the contrary under the guise of determining the legal sufficiency of the evidence is a flagrant disregard of the constitutional dichotomy of functions and powers between judge and jury.

But plaintiffs' evidence did not stop here with respect to this issue. William Brown, a truck driver, testified that he had, in 1939, attempted to traverse this very grade crossing with a truck-tractor which was pulling a low-boy trailer, on top of which was loaded a steam shovel. He stated that the condition of the grade and contour of the crossing was the same in 1939 as it was a few weeks before the trial (J. A. 59-60). Brown further testified that when he approached the grade crossing, he observed a watchman, who signalled him to cross,

and as he crossed the tracks, his equipment got "hung up" on the crossing. Finally, Brown testified that he unloaded the steam shovel, but before all the equipment could be moved, a train came along and struck the back of the low-boy trailer (J. A. 60). The occurrence of this similar and earlier mishap was corroborative evidence that this crossing was not "safe for public travel," and certainly a jury of reasonable men could have so concluded.

In addition, Stancliff, who owned a business in the area of the crossing, testified that while crossing over this same grade crossing in his automobile of standard manufacture some four years before the trial, he dragged his muffler on the crossing (J. A. 54).⁷ Such testimony constituted more substantial evidence that the condition of the approaches and grade crossing was not "safe and convenient" for public travel. And lastly, there were several photographs, introduced into evidence as a part of plaintiffs' case, which spoke most eloquently of the "hump" or "knoll" on defendant's crossing -- created by the up-grade of track bed and the sharp drop-off of the western approach -- which caused the Miller rig to become wedged on the bed of the crossing.

Under the many decisions on the subject, it is clear that whether a railroad is negligent in maintaining a highway grade crossing is a question of fact for the jury.⁸ In Baltimore & Ohio R. Co. v. Postom,

⁷ In its Memorandum in Opposition to the motions for new trial below, defendant referred to an automobile "in an undetermined condition, travelling at an undetermined speed, weighed down with an undetermined load" (at p. 2). In the absence of any evidence laying a foundation for these innuendoes, and particularly since they were not raised on cross-examination, reference to them later was clearly specious.

⁸ B & O. R. Co. v. Cmns. of Howard County, 113 Md. 404, 77 Atl. 930 (1910); B & O. R. Co. v. Postom, 85 U.S. App. D.C. 207, 177 F. 2d 53 (1949); B. & O. R. Co. v. Deneen, 161 F. 2d 674 (C.C.A. 4, 1947); So. Ry. Co. v. Maples, ___ Tenn. App. ___, 296 S. W. 2d 870 (1956); Marfilues v. Reading R. Co., 227 Pa. 281, 75 Atl. 1072 (1910); Lang v. Chi. & N. W. R. Co., 208 Minn. 487, 295 N. W. 57 (1940); Mo. Pac. R. Co. v. Sorrells, 199 Ark. 971, 136 S.W. 2d 1035 (1940); Collum v. So. Ry. Co., 189 S. C. 336, 1 S. E. 2d 234 (1939); Atl. R. Co. v. Twedell, 70 Ga. App. 812, 29 S. E. 2d 668 (1944); Lent v. N. Y., C. & S. R. Co., 69 Ohio App. 514, 44 N. E. 2d 295 (1942); So. Ry. Co. v. Williams, 243 Ala. 429, 10 So. 2d 273 (1942); Pa. R. Co. v. Sargent, 119 Ind. App. 195, 83 N. E. 2d 793 (1949); Bundy v. Seaboard Ry., 229 N. C. 707, 51 S. E. 2d 307 (1949); Niedner v. Wabash Ry. (Mo. App. 1949), 219 S. W. 2d 886; Schmedeke v. Wabash Ry., 350 Ill. App. 323, 112 N. E. 2d 742 (1953); Kan. C. Ry. v. Martin, ___ Okla. ___, 293 P. 2d 600 (1956); Parker v. Tex. & P. Ry. (Tex. Civ. App. 1952), 246 S. W. 2d 950.

85 U.S. App. D.C. 207, 177 F.2d 53, this Court decided a case where an automobile ran off the edge of a railroad crossing, became wedged in between the ties, and was later struck by a train. The driver of the automobile testified that "loose gravel" caused his car to slide off the crossing. The alleged presence of loose gravel was directly rebutted by testimony of a railroad employee, and apparently by photographs taken by the railroad three days later. The accident, there, as here, occurred in nearby Maryland. The majority of this Court, speaking through Judge Holtzoff, there sitting by special designation, and who tried the present case below, held there was substantial evidence from which the jury could have concluded that the crossing was negligently constructed or maintained.

The plethora of evidence here showing the dangerous and unsafe nature of the defective hump or knoll on defendant's crossing, and the prior difficulties encountered by persons attempting to use the crossing, together with the pictorial evidence, constituted a much more compelling picture of negligence to be considered and decided by a jury of reasonable men than did the facts in Postom. The Court there said:

"The trial court on a motion for a directed verdict must view the evidence from the standpoint most favorable to the adverse party. It must assume that the jury may resolve the conflict against the moving party, and from the facts as found draw the inference most favorable to his opponent."

Judge Holtzoff then quoted an excerpt from an opinion of the Supreme Court:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. Richmond & Danville R. Co. v. Powers, 149 U.S. 43, 37 L. Ed. 642."

Evaluated in the context of those principles properly followed in the Postom case, the facts here require the conclusion that a jury of reasonable men could have found that the railroad crossing was negligently maintained, and that such negligence was the proximate cause of the accident.

II. The Defendant Railroad Is Liable Because Of The Negligent Conduct Of Its Grade Crossing Watchman.

A. The Watchman Was Negligent Under the Prevailing Circumstances In Signalling the Miller Equipment to Proceed Over the Railroad Crossing.

Under Maryland law, when a railroad places a watchman at its crossing to protect the traveling public, it is liable for his negligent acts or omissions causing injury to persons attempting to use the crossing; and the fact that the railroad maintains a watchman at a grade crossing is evidence of the dangerous nature of that particular crossing. Pennsylvania R. Co. v. Yingling, 148 Md. 169, 129 Atl. 36 (1925).

That the primary duty of a watchman stationed at a railroad grade crossing is to effectively guard the crossing, and see that no harm comes to persons or equipment using the crossing, requires no citation of authorities. It is also self-evident that when a traveler approaches a railroad crossing and sees a watchman on duty, he has a right to rely upon that watchman to safely direct him across the tracks. Miller testified (J. A. 24) -- in which he was corroborated by Lindsay (J. A. 45) -- that he stopped his rig while still about 150 feet from the crossing, when he saw the watchman with his stop sign paddle. Stancliff testified that the watchman kept Miller's rig under constant surveillance for the whole period of time it took the rig to slowly approach the track at 4-5 miles per hour (J. A. 54). The watchman saw, or should have seen, the Miller equipment clearly, with respect to its length, width, height and road clearance (J. A. 40). The watchman knew or should have known the grade, contour and characteristics of his crossing

better than anyone else, and certainly better than Miller, who, when operating his rig, was sitting at a height about equivalent to the top of the roof of an ordinary automobile in the cab of the tractor-truck (J. A. 22), from which it would obviously be difficult to note changes in the elevation of the road. In this connection, Stancliff, the disinterested eyewitness, testified on cross-examination as follows (J. A. 57):

"Q You referred to the hump effect, Mr. Stancliff. Can you see this humping effect you testified to from across the tracks; that is to say, on each side of the tracks?

"A You mean as you are approaching the railroad in travelling west?

"Q Travelling the same direction Mr. Miller was, as you approached the crossing, can you see this humping effect?

"A No, sir."

If there were any doubt as to whether or not Miller's equipment could safely clear the crossing, a reasonably prudent watchman, in the exercise of reasonable care, would have stopped the equipment and examined it further, or would have had the crossing "blocked" (warned approaching trains by "block" signals) before allowing the equipment to cross. In any event, a jury certainly could have so concluded. But the evidence shows that the watchman did none of those things. Instead, he waved Mr. Miller to proceed through the crossing.⁹

Maryland law requires that the crossing watchman allow the traveler to cross the tracks at the ordinary speed for the conveyance involved, and "with a fairly clear margin of safety," and if the watchman invited the traveler to cross when there was not sufficient time, the railroad was liable. Philadelphia Ry. Co. v. State, 259 Fed. 163 (C. C. A. 4, Md.)

The evidence demonstrated that about 40-50 seconds after Mr. Miller's rig became stuck or "hung up", the approach of defendant's train was signalled by the sounding of a buzzer in the watchman's shed. Since it was stipulated that the striking train was a scheduled train, approximately on schedule, and since it was the duty of the watchman, under the company's own rules,¹⁰ to have with him a copy of the current timetable (J. A. 62), the inference must be -- or at least the jury could reasonably have inferred -- that the watchman waved the Miller equipment onto the tracks, with actual or constructive notice that a fast passenger train was due at the crossing in a matter of a minute or two. The jury could have found that had there been a longer interval between the time the rig became "hung up" and the time of the collision, Miller and his assistant would have had sufficient time to unload the bulldozer from the trailer and then dislodge the trailer, which is what they were trying to do when the train came into sight (J. A. 27-28). Thus the jury could have found that the act of the watchman in waving the equipment onto the crossing when the passage of a train was imminent was negligence, and a proximate cause of the injury.

The rules of the railroad also require that the crossing watchman "shall be responsible to see that proper permission is secured to protect the movement of heavy machinery . . . across tracks at highway crossings" (J. A. 73). Plaintiffs' evidence showed that from the time the Miller equipment came into view until after the collision, the watchman did not have a conversation with anyone with respect to getting proper permission for the rig to pass. Therefore, the only possible

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The probative relevance of such rules was recognized by the Maryland Court of Appeals in the case of *State v. Pennsylvania R. Co.*, 190 Md. 586, 59 A. 2d 190 (1948), holding that regulations adopted by the railroad for the conduct of its system and employees may be some evidence of the employer's beliefs as to the standard of care required, and thus of the negligent nature of an act violating such rules; and that, under such circumstances, it is for the jury to determine whether such violation or nonobservance was negligence and the proximate cause of the injury. See also, *Jennings v. Philadelphia Ry. Co.*, 29 App. D. C. 219 (1907).

inference was that the watchman failed in his required duty to see that proper permission was secured to protect the passage of the Miller equipment across the tracks.

Thus the act of the crossing watchman in waving Miller and his equipment onto the grade crossing raised several substantial issues of negligence upon which plaintiff was entitled to have a jury's, not a judge's, verdict. The jury should have been allowed to determine whether a reasonable and prudent watchman should, without pause or hesitation, have waved a long, heavy piece of equipment onto a crossing which he knew contained a "hump" or "super-elevation"; whether a reasonable and prudent watchman should have waved such a rig onto the crossing, knowing that a fast passenger train was due at the crossing in a minute or two; and whether a reasonably prudent watchman would have failed to see that proper permission was obtained from the railroad authorities to protect the passage of the equipment; any or all of which the jury could have found to be negligence which proximately caused the accident.

B. The Watchman Was Negligent In Failing To Properly Signal the Train.

Once the buzzer in the watchman's shed sounded, signalling the approach of defendant's fast passenger train, the watchman became "panic-stricken", lost his head, ran to his shed, grabbed a red flag and ran up the side of the railroad tracks toward the onrushing train (J. A. 28, 41-42).¹¹ The fact that the watchman "lost his head" may, in and of itself, be considered negligence, when analyzed with the other negligent acts and omissions of the watchman, and the standard of conduct required of one in his position, as discussed below.

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The trial judge had no doubt as to the testimony on this point, when, during the argument on the motions for new trial, he said: "He [the watchman] was panic-stricken. The testimony shows that...." (J.A. 81)

Significant in evaluating the conduct of the watchman are the railroad's own rules. Rule 400-N-23 of the Operating Rules of the defendant railroad requires that crossing watchmen "must provide themselves with proper appliances and keep them in good order and ready for immediate use. The signal appliances for each watchman will be a standard stop sign, a red lamp approved as standard for the purpose, a red flag, a white lamp, fuzees, a whistle, standard gate lamps for crossing gates where used" (J. A. 72, emphasis supplied). The same rule further provides that, "When the crossing is obstructed or unsafe for train movements, they must use a red flag by day, a red light by night and when day signals can not plainly be seen and when necessary, in addition, display lighted fuzees¹² to stop movements on the track obstructed or unsafe" (J. A. 73; emphasis supplied). Rule 11 requires that "a train finding a fuze burning red on or near its track must stop and extinguish the fuze and then proceed at reduced speed" (J. A. 71; emphasis supplied.)

Although the foregoing rules give some indication as to what the watchman should have done in this case, the evidence shows a gross departure on his part -- a departure probably occasioned by his being panic-stricken and responsible for the collision that followed. The evidence showed that when the train first came into sight, it was 3/4 to 1 mile away, traveling at 85 m.p.h. (J. A. 30-31). At this distance, common knowledge tells us that it would be difficult to see the figure of a man, and even a red flag would appear as a small black dot. As a matter of every-day experience, a red flag could not be "plainly seen" (see company rule, p. 19, supra) and a jury could have so found. Moreover, if as the trial judge would have it, the train crew could not at that

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A fuze, as shown by the evidence, is a 6-inch flare, which, when lit, gives off a tremendous red glare, and which indicates danger (J.A. 66). Note statement of trial court, contrary to above rule: "Fuzes are not used for emergency. They are generally placed when a train stops." (J.A. 80)

distance see whether the huge rig was stalled or moving (and could "assume" it was moving), how could they be expected to see a tiny red flag? And by the time the train crew got close enough to see the red flag, they would be too close to the crossing, traveling at 85 m.p.h., to stop the train.¹³ The watchman admitted on the stand that a fuzee gives off a tremendous red glare, indicates danger, and takes only a few moments to light (J. A. 66). And, therefore, under all of the circumstances, the jury could have found that the use of a fuzee was "necessary" in the strongest sense of that word, as used in defendant's own rules.

The court, in directing its verdict for defendant, said (J. A. 77):

"The watchman was acting in an emergency. He may have had to make a quick decision. He chose to run up the track waving a red flag rather than take the time to pull put [sic] a fuze, place it on the track and light it.

"The Court does not believe that it is possible or proper to find that the judgment used by the watchman in this respect was evidence of negligence. In fact, the judgment might have been sound. In any event, the watchman had a choice under the circumstances and it could not be said his choice was negligence."

There can be little doubt that the crossing watchman was acting in an "emergency" and had to make a quick decision, after the Miller rig became "hung up" on the crossing and the buzzer sounded the approach of the train. It is a non-sequitur, however, to argue, as did the trial court, that the "choice" of the watchman in this emergency, in running up the track waving a red flag, as opposed to lighting a fuzee, cannot possibly be said to have been negligence. This thought

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The ineffectiveness of the watchman's attempt to stop the train could also be considered by the jury in determining whether the watchman's acts were reasonable under the circumstances. Although the train was visible while still 3/4 to 1 mile away, the defendant admitted at pre-trial that its train was going 70 m.p.h. at impact (J.A. 58-59). Stancliff estimates the train's speed at 85-90 m.p.h. (J.A. 56-57) just before the crash. The inference is therefore -- and a jury could have found -- that the train crew did not in fact see the watchman, or his flag.

immediately invokes three important considerations.

In the first place, the defendant railroad placed the watchman at this grade crossing because they felt that it was dangerous, Pennsylvania R. Co. v. Yingling, supra; that there might be a situation where the watchman would be required to act in an emergency to prevent an accident. The watchman is like a lifeguard; the very nature of his job is to prevent emergencies, or once they occur, to prevent accidents, if possible. The jury should have been permitted to consider the "choice" made by the watchman, using as a standard what a reasonably prudent grade crossing [watch]man would have done under the circumstances. In any event, the actions of the watchman and his "choice" should have been submitted to the jury, with the fact of the "emergency" being just one more element for the jury to consider in evaluating whether that "choice" made by a panic-stricken man was reasonable. Of especial importance in this respect is the case of Fruehauf Trailer Co. v. Gusewelle, 190 F.2d 248 (C. C. A. 8, 1951), cert. den., 342 U.S. 866, where the court held:

"The sudden emergency doctrine is not an exception to the general rule that one must act at all times as a reasonably prudent man would act under the same circumstances. An emergency is merely one of the circumstances to be considered by the jury in determining if the party's course of action was one that an ordinarily prudent man would have followed" [emphasis supplied.]

See also, Grober v. Capital Transit Co., 119 F.Supp. 100 (D. C. D. C. 1954).

Secondly, the trial judge, before directing the verdict for defendant, said to the jury (J. A. 77):

"In any event, the watchman had a choice under the circumstances and it could not be said his choice was negligence."

The word "choice", as used here by the trial judge, infers some kind of intellectual decision between at least two rational alternatives. Obviously, there could be no such "choice" if there were ignorance as to one of the alternatives. The evidence clearly demonstrated, and the jury could have found, that the crossing watchman was woefully ignorant concerning the operation and uses of a fuze. His testimony shows a background of no experience and little, if any, training in the use of fuzes. The watchman admitted that he had never lit a fuze (J. A. 67). His evasive and general answers as to his "training" in the use of the fuze showed up the glaring lack of his knowledge (J. A. 70-71):

"Q Were you ever, Mr. Witness, trained by the Pennsylvania Railroad in how to use these fuzes, how long it takes to light them and under what circumstances to use them?

"A I was qualified as a watchman.

"Q Were you ever trained by the Pennsylvania Railroad in how to use these fuzes?

"A I was qualified as a watchman; that is all I know.

"THE COURT: He has answered the question.

"BY MR. BERNSTEIN:

"Q When you were qualified, were you trained in the use of fuzes?

"A I could read the direction on the fuze and understand how to ignite it.

"Q Did anyone ever read the directions to you and explain them?

"A Yes. They have been read.

"Q When you were qualified as a watchman?

"A Sure.

"Q From those can you tell how long it takes to light one?

"A No."

And in reply to a question whether or not a fuze is more effective at a distance than a red flag, the watchman answered, "I don't know" (J. A. 67). How can it be said as a matter of law that the "choice" made by the watchman was not negligent, when it was so obviously based on ignorance? The jury should have been permitted to judge the watchman's "choice", particularly in the context of his "panic-stricken" state, as against that of a reasonably prudent watchman under the same or similar circumstances. At the very least, there was a substantial question of fact as to whether the watchman's "choice" in the present case was negligent, and a proximate cause of the collision.¹⁴

And lastly, can it be said that the trial judge, in disregarding all of the foregoing substantial evidence showing the watchman's negligence, gave plaintiffs all of the favorable inferences from the evidence to which they are by law entitled? Can it be said, as a matter of law, that no reasonable man could find that the watchman was negligent, when the evidence showed that he waved heavy grading equipment onto a railroad crossing, when he could see the road clearance of the equipment and knew the elevation of his crossing; when the watchman failed to get proper permission required by the rules of his employer; and when the watchman "panicked" and failed to warn the oncoming train of the obstructed crossing by the use of fuzes which he had available for "immediate use," which failure was also patently in violation of the company's rules? Plaintiffs contend that each of the above issues of negligence could not properly be resolved as a matter of law, but constituted substantial evidence of negligence which proximately caused the accident. A jury could have so found.

III. The Defendant Railroad Is Liable Because Of The Negligent Conduct Of Its Train Crew.

The evidence with respect to the negligence of the train crew in the present case was substantial, clear and uncontradicted. There was testimony that when the defendant's train came into sight, it was about 3/4 to 1 mile away and visibility was "very good." (J. A. 30). The logical inference to be drawn from this evidence is that the train crew could have seen the four large pieces of grading equipment "hung up" on the railroad tracks, had they been keeping a proper lookout. Secondly, there was the testimony of the engineer of the train who stated that he could have stopped his train in 3000 feet, possible 2500 feet (J. A. 64-65). Simple arithmetic would seem to compel the submission of the issue as to the train crew's negligence to the jury, since the train crew saw or should have seen the Miller rig "hung up" on the crossing when they were 3/4 to 1 mile away, and since the train could have been brought to a stop in 3000, possibly 2500 feet, and obviously was not.

These circumstances raised factual questions for the jury as to whether or not the train crew was negligent in failing to keep a proper lookout, as required by its duty of reasonable care, or whether, once having discovered the "hung up" equipment, they exercised reasonable diligence in bringing the train to a stop. At the very least, it would seem that the train crew should have been made to come forward and explain why, in the exercise of reasonable care, they didn't see the "hung up" rig, and why they didn't stop the train before striking it.

American jurisprudence has been settled for many years on the proposition that a train crew must keep a proper lookout for obstructions or other dangers on the tracks, especially where the traveling public is permitted to cross the railroad tracks at grade crossings;¹⁵

¹⁵ Consumers Lumber Co. v. Atl. C.L.R. Co., 117 F. 2d 329 (C.C.A. 5, 1941); Mo. Pac. R. Co. v. Lemons, 198 Ark. 1, 127 S. W. 2d 120 (1939); Louisville R. Co. v. Elzey, 302 Ky. 407, 194 S. W. 2d 962 (1946); Sutter v. Pere Marq. R. Co., 230 Mich. 489, 202 N. W. 967 (1924); Ill. Cent. R. Co. v. Lee, 212 F. 2d 496 (C.C.A. 5, 1954); Ill. Cent. R. Co. v. Harrison, 224 Miss. 331, 80 So. 2d 23 (1955); Wolf v. N. Y., Chi. R. Co., 347 Mo. 622, 148 S.W. 2d 1032 (1941); Schaaf v. Owen, 131 Ohio 279, 2 N.E. 2d 605 (1936); St. Louis Ry. v. Van Hoy, ___ Okla. ___, 268 P. 2d 582 (1954); B. & O. R. Co. v. Griffith, 34 App. D.C. 469 (1910).

and the railroad is liable if the train crew fails to take measures to avoid the collision, after the crew has discovered the peril on the tracks, or should have discovered the peril by the exercise of reasonable care. 44 Am. Jur. 750; 3 Shearman & Redfield on Negligence 1086 (Rev. Ed.); 7 Huddy on Automobile Law 96 et seq. The courts have generally held that the duty owed is one of reasonable care, but in judging what reasonable care may be in a particular case, the jury may consider the nature of the crossing; and the fact that the railroad places a watchman at a crossing is evidence of its dangerous character. Pennsylvania R. Co. v. Yingling, supra.

In the case of Union Pacific R. Co. v. Ward, 230 F.2d 287 (C.C. A. 10, 1956), a train came around a curve onto a straight-a-way, at which point the train crew saw a stalled trailer truck 2000 feet away, but the engineer, thinking that the truck was clear of the track, waited until he was 1000 feet away before he put his train into emergency, at which time it was too late. There was testimony there, as here, that the train could have been stopped before it reached the crossing, if it had been thrown into emergency when the train crew first saw the trailer truck. In affirming the trial court's submission of the case to the jury on instructions as to both primary negligence and last clear chance, the court said (at p. 290):

"Obviously, we cannot tell whether the jury's verdict rests upon primary negligence and non-contributory negligence or the last clear chance. But in either event, the factual issue of negligence is the same, namely, should the engineer have discovered the perilous situation when he first saw the truck 2000 feet from the crossing. If so, his conduct is certainly susceptible of a finding that he had the last clear chance to avoid the accident."

See also Fitzgerald v. Boston and Maine R., 328 Mass. 297, 103 NE (2d)321 (1952).

In Canadian Pacific Ry. Co. v. Sullivan, 126 F.2d 433 (C. C. A. 1, 1942), the appellate court affirmed the trial court's refusal to direct a verdict in favor of defendant railroad, where defendant's train struck a stalled automobile at a grade crossing. In that case, there was no evidence as to the distance in which the train could have been stopped, but the court held (at p. 441):

"If the jury should find that the train could not have been stopped in the distance between the curve and the crossing they would be warranted in concluding either that the train was being operated at an excessive speed or else that its brakes were defective. In the event of either of these findings the conclusion would be warranted that the defendant was negligent. In short, from the evidence before us the jury could have found that if the train could have been stopped it should have been, and, if it could not have been stopped, the defendant was negligent either in running its train too fast or in operating it with defective brakes."

In the instant case, Miller testified the train was going 85 m.p.h.; the eyewitness, Stancliff, testified it was going 85-90 m.p.h. just before impact -- and defendant admits in its own pre-trial statement that its train was traveling at 70 m.p.h. when it struck plaintiffs' equipment. These facts alone, when coupled with the evidence that defendant's train crew could have seen plaintiffs' equipment 3/4 to 1 mile away, would have warranted the submission of the defendant's negligence to the jury on the ground that the train crew was not exercising reasonable care in keeping a proper lookout, that they were traveling at an excessive speed, or that the defendant was operating its train with defective brakes, any one of which would have been negligence and the proximate cause of the accident.

In addition to the evidence discussed above, there was Miller's uncontradicted testimony that just before the crash he saw no sparks from the train wheels, heard no squeal of brakes, or anything of that

character, and that the train did not appear to be slowing in any way "whatsoever" (J. A. 29). In this there was corroboration from Stancliff (J. A. 56) and Lindsay (J. A. 47). The appellate courts have many times considered this type of testimony as sufficient evidence to affirm the denial of a motion for a directed verdict made on behalf of defendant railroads. This evidence is uniformly held to make it a question for the jury, as to whether the train crew kept a proper lookout and kept their train under proper control. Mo. Pac. R. Co. v. Mitchell, 197 Ark. 400, 122 S. W. 2d 544 (1938); Un. Pac. R. Co. v. Shupe, _____ Colo. _____, 289 P. 2d 1115 (1955); Bryant v. No. Pac. Ry., 221 Minn. 577, 23 N. W. 2d 174 (1946); Fitzgerald v. Bos. & Me. R. Co., 328 Mass. 297, 103 N. E. 2d 245 (1952); Murray v. So. Ry. Co. (Tenn. App. 1949), 32 CCH Auto. 35 (1949).

In summary, the jury could have found under the evidence before them that the train could have been stopped before it reached the crossing; that the train crew was negligent in failing to do so; and that such negligence was the proximate cause of the collision and the injury.

The trial judge stated during oral argument on plaintiffs' motions for a new trial (J. A. 81):

"I think the evidence was clear that this crossing could have been seen a half mile away or more than a half a mile away, and if the engineer half a mile away started to slow down the train he could have stopped before he reached the crossing and avoided the collision."

Plaintiffs earnestly submit that the substantial nature of the evidence, as outlined above by the trial judge,¹⁶ raised serious questions of negligence which could only be properly resolved by a jury.

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Giving the plaintiffs the favorable inferences from the evidence to which they were entitled, the court should have found the crossing was visible 3/4 to 1 mile away, as the uncontradicted evidence showed (J.A. 30).

Next, the trial court stated (J. A. 81):

"But what motivated the court was not that. He [apparently speaking of the train engineer] had right to assume when a half mile away he saw this calva-cade, so to speak, these vehicles, that they would clear the intersection. He had no reason for assuming that they were stalled."

But there was no evidence in the record from which a judge, as a matter of law, could find that the engineer saw the rig stuck on the crossing at any time before the collision. There was evidence from which a jury could find that the engineer saw or should have seen the rig. By stating that the engineer saw the rig, the trial judge has performed a jury function; he has selected one of two possible inferences from the evidence upon which reasonable men might have differed. In addition, the trial judge has assumed, without any evidentiary basis, that the train crew fulfilled its duty as to keeping a proper lookout, as required of it in the exercise of reasonable care.

Moreover, even assuming, arguendo, that the train crew saw the equipment "hung up" on the tracks when still 3/4 to 1 mile away, there is no evidence in the record which supports the finding that they "assumed" that equipment would clear the tracks. There is no testimony as to what assumptions, if any, were made by the engineer. The only assumptions made here were those by the trial judge. Not only were the plaintiffs denied their right to have the evidence construed in their favor, but, on this point, it is clear the trial court, contrary to law, drew inferences against the plaintiffs.¹⁷

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The trial court apparently relied upon McDonald v. Pennsylvania R. Co., 210 F. 2d 524 (C.C.A. 3, 1954), and Woodington v. Pennsylvania R. Co., 236 F. 2d 760 (C.C.A. 2, 1956) in directing its verdict (J.A. 78); both cases arose out of the same accident. Neither case supports the trial court's action, firstly, because in both cases the issues of negligence were submitted to the jury; and secondly, the evidence was completely dissimilar -- there, the crane's engine stalled on the crossing; the railroad had no watchman on duty; and there was no evidence that the train could have been stopped when the traincrew first saw or should have seen the stalled equipment.

In so directing a verdict for the railroad based upon an evaluation of evidence and a selection of inferences appealing to his reason, the trial court succumbed to that error against which, in Burcham v. Stevens & Co., 209 F.2d 35, 38 (C. C. A. 4, 1954), Chief Judge Parker so articulately warned in stating that:

"The courts are constantly urged in cases of this character to substitute their judgment for that of the jury on questions of fact; and the seductive argument is made that a conclusion of fact which appears to the court to be reasonable is so clear that reasonable men could reach no other. If this sort of reasoning is allowed to prevail, however, it means that the courts are substituting their judgment for that of the jury on fact questions in violation of the constitutional requirement."

See also, Schulz v. Pennsylvania R. Co., 350 U.S. 523 (1956).

CONCLUSION

Plaintiffs were entitled to have a jury of reasonable men settle the substantial factual issues of negligence raised by the evidence in this case; first, as to whether the defendant railroad was negligent with respect to the maintenance and construction of its railroad grade crossing; second, as to whether the crossing watchman was negligent in the manner in which he directed plaintiffs' rig onto the crossing, and in the manner in which he unsuccessfully attempted to warn the train of the obstructed crossing; and third, as to whether the train crew was negligent in failing to stop the train before it reached the crossing when they had the opportunity and ability to do so, and thus to have avoided the accident. Plaintiffs are guaranteed a trial by jury by the Seventh Amendment to the Constitution. When the trial court directed a verdict for defendant at the close of plaintiffs' case in chief, they were denied this right. Plaintiffs respectfully ask,

therefore, that the judgment below be reversed and the case remanded for a new trial.

Respectfully submitted,

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JOINT APPENDIX

176

[Filed April 4, 1955]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILFRED L. MILLER,
912 Belvedere Boulevard
Silver Spring, Maryland

Plaintiff

vs.

Civil Action No. 1520-55

PENNSYLVANIA RAILROAD COMPANY,
a corporation
626 14th Street, N. W.
Washington, D. C.

Defendant

COMPLAINT
(For Property Damage)

1. The claim for relief herein on behalf of Wilfred L. MILLER against the PENNSYLVANIA RAILROAD COMPANY, a corporation, is for an amount in excess of \$3,000, and is within the jurisdiction of this Court.

2. On or about January 25, 1955, at approximately 5:12 P.M., plaintiff WILFRED L. MILLER was operating a tractor trailer carrying a bulldozer and related equipment in a westerly direction on the Lanham Station Road, which vehicle became wedged in the railroad tracks at the Lanham crossing, Prince Georges County, Maryland, and at said time and place said vehicle was struck by a train traveling in a general southerly direction, which train was owned by the defendant, PENNSYLVANIA RAILROAD COMPANY, a corporation, and operated by its agents, servants and employees. Said collision was due to the negligence and carelessness of the defendant, PENNSYLVANIA RAILROAD COMPANY, a corporation, through its agents, servants and

employees, in the improper maintenance of its said tracks and crossing, after due notice thereof, and in the operation of its train, said acts of negligence being violations of the Traffic and Motor Vehicle Laws and General Laws of the State of Maryland then and there in full force and effect.

177 3. As a result of said collision plaintiff WILFRED L. MILLER has incurred substantial property damage to, and the loss of use of, the said tractor trailer and said equipment thereon, and loss of business, all to the damage of plaintiff in the sum of \$100,000.

WHEREFORE, plaintiff demands judgment against defendant in the sum of \$100,000, besides costs.

NEWMYER & BRESS

By /s/ Alvin L. Newmyer

/s/ David M. Wortman

Attorneys for Plaintiff
1001 - 15th Street, N. W.
Washington, D. C.

Plaintiff demands a trial by jury on all issues herein.

/s/ Alvin L. Newmyer

ANSWERFirst Defense

1. Defendant admits the jurisdiction of this Court.
2. Defendant admits that a collision occurred on January 25, 1955 in the vicinity of the Lanham Station Road between a tractor trailer operated by the plaintiff and a train owned and operated by the defendant. Defendant denies the remaining allegations of paragraph 2 of the complaint.
3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint.
4. Defendant denies that the plaintiff is entitled to judgment in the amount of \$100.000.00 or in any amount whatsoever.

Second Defense

1. Defendant alleges that the damage, if any, as set forth in the complaint was caused in whole or in part or was contributed to by the negligence of the plaintiff.

Third Defense

1. Defendant alleges that the damage, if any, as set forth in the complaint resulted from and was caused by risks which were known to and assumed by the plaintiff.

COUNTERCLAIM

For counterclaim against the plaintiff, the defendant alleges:

1. On or about January 25, 1955, the plaintiff unlawfully, negligently and carelessly and in violation of the traffic and motor vehicle laws and general laws of the State of Maryland then and there in full force and effect drove a tractor trailer carrying certain heavy earth moving equipment on a railroad crossing at Lanham Station, Prince Georges County, Maryland, and stalled or wedged the tractor trailer and the said earth moving equipment on the said crossing, thereby

causing a collision between the tractor trailer and the said equipment and a train operated by The Pennsylvania Railroad Company.

2. The said collision was caused by the unlawful, negligent and careless conduct of the plaintiff in loading, operating and driving the said tractor trailer and by its negligent, careless and unlawful conduct in attempting to move the said tractor trailer and equipment over the said railroad crossing.

3. As a result of the aforesaid negligent, careless and unlawful conduct of the plaintiff the defendant incurred damage to its locomotive, 180 cars, electrical equipment and other property in the sum of \$50,000.

WHEREFORE, defendant demands judgment against the plaintiff in the sum of \$50,000.00 besides costs.

/s/ Paul F. McArdle

Hugh B. Cox
James H. McGlothlin
Paul F. McArdle
701 Union Trust Building
Washington 5, D. C.
Attorneys for Defendant

[CERTIFICATE OF SERVICE]

183 [Filed February 5, 1957]

INTERVENOR'S COMPLAINT AGAINST DEFENDANT
PENNSYLVANIA RAILROAD COMPANY

1. This Court has jurisdiction of the within cause of action, the amount in controversy exceeding the sum of Three Thousand Dollars (\$3,000.00).

2. On or about January 25, 1955, at approximately 5:12 P.M., plaintiff Miller was operating a tractor-trailer carrying a bulldozer and related equipment, in a westerly direction on the Lanham Station Road,

which vehicle became wedged in the railroad tracks at the Lanham Crossing, Prince Georges County, Maryland; and at said time and place, said vehicle was struck by a train travelling in a generally southerly direction, which train was owned by defendant and operated by its agents, servants or employees. Said collision was due to the negligence and carelessness of defendant, through its agents, servants, or employees, in the improper maintenance of its said tracks and crossing, after due notice thereof, and in the operation of its train, said acts of negligence being violations of the traffic and motor vehicle laws and general laws of the State of Maryland, then and there in full force and effect.

3. As a result of said collision, the bulldozer with accessories, which Plaintiff Miller was transporting, was damaged extensively; said bulldozer was owned by the plaintiff-intervenor, Alban Tractor Co., Inc.; said company was the conditional sales vendor of said bulldozer to the plaintiff Miller, the conditional sales vendee; that the said vendee had not paid for said bulldozer at the time of the collision; and thereby, plaintiff-intervenor, Alban Tractor Co., Inc., sustained a substantial property damage loss to its bulldozer; which after salvage, said loss to plaintiff, Alban Tractor Co., Inc., was in the sum of Seven Thousand Seven Hundred Seventy Dollars and Thirty Four Cents (\$7,770.34).

WHEREFORE, the intervening plaintiff, Alban Tractor Co., Inc., demands judgment against the defendant, Pennsylvania Railroad Company, a corporation, in the sum of Seven Thousand Seven Hundred Seventy Dollars and Thirty Four Cents (\$7,770.34), besides interest and costs.

The Plaintiff-Intervenor demands trial by jury.

/s/ Joseph D. Bulman

/s/ Joseph D. Bulman

/s/ Charles Jules Rose

/s/ Sidney M. Goldstein

/s/ Samuel Z. Goldman

Attorneys for Plaintiff-
Intervenor

800 Woodward Bldg., DI 7-0158

[Filed February 11, 1957]

**ANSWER OF DEFENDANT TO
INTERVENING PLAINTIFF'S COMPLAINT**

The defendant, through its attorney, answers the intervening plaintiff's complaint herein as follows:

First Defense

The complaint of the intervening plaintiff fails to state a claim upon which relief can be granted.

Second Defense

1. The defendant admits the allegations contained in paragraph 1 of the complaint of the intervening plaintiff.

2. The defendant admits that, on or about January 25, 1955, at approximately 5:12 p. m., the plaintiff, Wilfred L. Miller, was operating a tractor trailer carrying a bulldozer and related equipment in a westerly direction on the Lanham Station road and that said bulldozer and equipment were struck by a train traveling in a generally southerly direction, owned by the defendant, and operated by its agents, servants or employees. The defendant denies the remaining allegations contained in paragraph 2 of the complaint of the intervening plaintiff.

3. The defendant admits that the bulldozer which plaintiff, Wilfred L. Miller, was transporting was damaged extensively, and states further that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint of the intervening plaintiff.

4. The defendant denies that the intervening plaintiff is entitled to recover any amount whatsoever from the defendant.

Third Defense

As a separate defense, the defendant states that the accident involved herein was caused solely by the negligence of the plaintiff, Wilfred L. Miller.

Fourth Defense

As a separate defense, the defendant states that the accident involved herein was caused partially by the negligence of the plaintiff, Wilfred L. Miller.

/s/ Paul F. McArdle

James C. McKay
701 Union Trust Building
Washington, D. C.
Attorneys for Defendant

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[CERTIFICATE OF SERVICE]

192

[Filed April 9, 1957]

PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

Action for property damage. Plf was the owner of a trailer and intervening plf was the owner of a tractor. The tractor trailer was crossing deft's railroad having been signalled to cross by deft's watchman. It became stuck while crossing the tracks owing to an excessive down-hill grade of the crossing. Tractor trailer was struck by deft's train and demolished.

Other acts of negligence are set forth in annexed pretrial statement. Pretrial judge strikes out acts 8, 9 and 11 as too indefinite and insufficient.

Plf claims that the Interstate Commerce Commission fixed the maximum speed limit in the area of the accident at 80 miles an hour and that the train was proceeding in excess of that speed.

Dft admits the collision. Dfts admits that its watchman waved the plf to drive through the crossing. Dft claims that the trailer tractor was unusually low, long, cumbersome and heavily loaded and that it was negligent to try to drive it across the railroad tracks, and that plf was familiar with the crossing. Dft further claims that plf should have

followed a route which would not take him across railroad tracks. Dft further claims that plf failed to obtain from Md Dept of Motor Vehicles the permit required to drive vehicles of this type. Dft further claims that plf failed in his duty to notify dft of his intention to drive his equipment across the railroad tracks. Dft also relies on assumption of risk, and on contributory negligence.

Damages are specified in annexed pretrial statement. Plf is directed to file and serve within ten days an itemized statement showing how the figure of \$30,000 damages is arrived at; such statement to contain names and dates of prospective contracts. Otherwise the deft may move to preclude testimony on this item of damage.

193 Intervening complaint is deemed amended as requested in pretrial statement.

Damages claimed by intervening plf are set forth in his pretrial statement.

Dft counterclaims for damages caused to locomotive and cars and telegraphic and signal equipment. Dft will serve and file within five days an itemized statement of damages.

It is stipulated that the following may be admitted in evidence without formal proof subject to objection as to relevancy and competency:

Photographs initialled by the Court

Bills and contract initialled by the Court

Regulations of Prince Georges County

Interstate Commerce Commission regulations

Other documents initialled by pretrial judge

It is stipulated that photostats may be used in lieu of original bills.

It is stipulated that the numbers of the cars that were injured were: PRR#3923, PRR#7809, Pullman Car Poplar Pike and Pullman Car White Oak; Motor No. 4841.

Parties will exchange names and addresses of witnesses within five days.

Dft will furnish plf within ten days a statement of block signals.

The counterclaim shall be deemed denied as though a reply had been filed.

Dated April 9, 1957

Alexander Holtzoff, Pretrial Justice.

REMARKS of Pretrial Justice for consideration of Trial Justice:

Attorneys authorized to act:

Newmyer and Bress

/s/ Samuel L. Goldman
for
Intervening PLF

/s/ Wilmer S. Schantz, Jr.

/s/ James C. McKay

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[Filed April 9, 1957]

PRE-TRIAL STATEMENT OF PLAINTIFF

Facts:

This is an action for damages to personal property arising out of an accident which occurred when defendant's train crashed into plaintiff's equipment which was attempting to traverse defendant's railroad crossing at Lanham, Maryland, January 25, 1955, at about 5:10 P.M. Plaintiff's equipment which consisted of a so-called tractor and "low-boy" trailer carrying a bulldozer and earth scraper, was negligently signalled to cross defendant's railroad crossing in a westerly direction by defendant's watchman when he knew or should have known a train was to pass there in a matter of seconds. Said watchman was defendant's employee, acting within the scope of his employment. Because of the negligent construction and maintenance of defendant's crossing and approaches thereto, plaintiff's trailer became hung on the crossing. Defendant's train, negligently travelling at a speed in excess of 80 miles per hour, crashed into plaintiff's equipment a few seconds thereafter, causing extensive damage thereto.

195 Negligence claimed:

1. Failure to furnish a competent or adequately trained watchman at the crossing.

2. Negligence of watchman in signalling plaintiff Miller to cross the track without first determining whether the trailer would clear the crossing without becoming hung thereon.

3. Negligence of watchman in signalling plaintiff Miller to cross the tracks without knowing when the next train was to pass the crossing.

4. Negligence of the watchman in failing to take reasonable action to warn the oncoming train of plaintiff's peril on the tracks, after the damage became known.

5. Negligence of the defendant in failing to provide an adequate warning system to warn approaching trains of perils on the tracks at the Lanham, Maryland, crossing.

6. Negligence of the defendant in failing to provide its watchman with a schedule of its trains' movements.

7. Negligence of the defendant in failing to provide an adequate warning system of approaching trains.

8. Negligence of defendant's train crew in operating the striking train at an excessive rate of speed under the circumstances.

9. Negligence of the train crew in failing to keep their train under such proper control as to avoid striking plaintiff's equipment.

10. Negligence of the train crew in failing to keep a proper lookout for perils on the tracks at the Lanham, Maryland, crossing.

11. Negligence of the defendant in failing to construct and maintain the railroad crossing and approaches in a reasonably safe condition.

196 12. Negligence of the defendant in maintaining a dangerous downhill grade on the western approach of the railroad crossing at Lanham, Maryland.

Damages

1 La Cross trailer	\$	3,370
1 Caterpillar tractor		11,200
1 Earth scraper		2,400
Repairs to "fifth wheel"		200
Loss of sales, business opportunities and good-will		30,000
	\$	<u>47,170</u>

Stipulations:

1. Plaintiff requests admission into evidence without formal proof the following documents, to be initialed by the pre-trial judge:

Photographs
Conditional sales contracts
Bills of sale
Repair bills and estimates of repairs
Maryland statutes

Requests:

1. Plaintiff requests the names, addresses, telephone numbers and places of employment, if known, of all witnesses expected to be called by the defendant within 10 days of pretrial.

2. Plaintiff requests a copy of the "speed tape" of defendant's striking train for the 10 minutes preceding the impact.

3. Plaintiff requests leave of Court to file interrogatories, provided they do not delay the trial of this case.

NEWMYER AND BRESS

/s/ Sheldon E. Bernstein

/s/ Wilmer S. Schantz, Jr.

Attorney for Plaintiff
1001 - 15th Street, N. W.
Washington 5, D. C.

197

[CERTIFICATE OF SERVICE]

198

[Filed April 9, 1957]

PRE-TRIAL STATEMENT OF INTERVENOR (PLAINTIFF)

Note: Plaintiff Intervenor, Alban Tractor, requests court to amend complaint to show damage to its interest in the amount of \$8830.20 rather than \$7770.34.

Occurrence: On January 25, 1955, plaintiff Miller was operating a tractor-trailer carrying a bulldozer and related equipment, in a westerly direction on the Lanham Station

Road, which vehicle became wedged in the railroad tracks at the Lanham Crossing, Prince Georges County, Maryland; and was struck by defendant's train traveling in a generally southerly direction, damaging the bulldozer and accessories. The bulldozer with accessories was owned by plaintiff, intervenor, as conditional sales vendor to plaintiff Miller, the conditional sales vendee, who had not paid for said equipment at time of collision.

Liability: Failure to construct and/or maintain railroad track bed, approaches thereto (crossing) and highway (Md. Code, Art. 89B, § 38)

Excessive speed;

Failure to operate train at a reasonable speed under the circumstances prevailing;

Failure to have a competent, trained crossing watchman;

Failure to provide watchman with train schedules to enable him to control crossing; and to provide watchman with warning device so he can notify train of track obstruction;

Failure to provide watchman with warning device which will tell him where train is within more than next preceding station;

Negligence of watchman in waving plaintiff Miller onto tracks without ascertaining if rig could cross with safety and without wedging; and/or without knowing when next train due.

<u>199 Damages:</u>	Total purchase price		\$ 20,152.20
	Less Trade-in	\$ 2621.00	
	Down payment	1000.00	
	9 installment payments	6201.00	9,822.00
	Amount unpaid by Miller to Alban Tractor		\$ 10,330.20
	Less Salvage		1,500.00
	Net amount owed Alban Tractor by Miller		\$ 8,830.20

Estimate of repair to equipment was approximately \$13,000.00

Stipulations:

Conditional sales contract;

Plaintiff intervenor's loss

Exchange names and addresses within 10 days of persons who witnessed accident, or were on the scene shortly before or after.

Maryland statutes.

Parties to produce photos at pre-trial and trial.

[Filed April 9, 1957]

PRE-TRIAL STATEMENT OF DEFENDANTStatement of Facts

On January 25, 1955, at about 5:10 p. m., a passenger train of the defendant proceeding in a southerly direction towards Washington, D. C., collided with certain equipment of the plaintiff which was stopped on the tracks of the defendant. The collision occurred at the Lanham crossing, Lanham, Maryland. The plaintiff's equipment consisted of a so-called low boy trailer pulled by a tractor and on which was loaded a bulldozer and an earth scraper. This equipment was of excessive length (over 55 feet) and weight, and, as its name indicates, was built low to the ground.

The plaintiff left Ardmore, Maryland, intending to proceed to Silver Spring, Maryland. The trip could have been made without crossing any railroad tracks; however, the plaintiff, as a convenience to himself, turned off from Whitfield Road on to Lanham Station Road instead of proceeding to Route 50. Although the plaintiff was required by law to obtain a permit to make this trip with this oversize equipment, and to specify the route to be followed to the Maryland State Roads Commission, he knowingly failed to obtain such a permit.

201 The plaintiff turned off Whitfield Road and proceeded in a westerly direction on the Lanham Station Road. He had never driven this equipment over this particular crossing before, although he had driven over it in his own automobile, and was familiar with the crossing.

The Lanham crossing was in good condition on the date of the accident, and without defects. Lanham Station Road slopes towards the crossing from the east. The crossing, consisting of three tracks, is level, as is the road, for a substantial distance on either side of the tracks. Lanham Station Road continues its downward slope to the west of the crossing.

The plaintiff brought his equipment to a stop east of the tracks at the brow of the aforementioned hill on the Lanham Station Road. The defendant's crossing watchman saw that the equipment was not so high as to become entangled with the defendant's overhead electrical equipment; ascertained that no trains were approaching near the crossing; and motioned the plaintiff to proceed across the crossing.

The plaintiff's tractor cleared the crossing, but as the front end of the trailer started down the slope of the road on the west side of the crossing, the rear part of the trailer hung on the road to the west of the tracks. The trailer was caused to hang up because of its unusual length and because it was low to the ground.

Several minutes after the equipment hung up, the buzzer in the watchman's shack warned of the approach of a train from the north. The plaintiff was unable to free his equipment, and jumped to safety. The watchman started up the tracks with a red flag in an effort
202 to warn the train crew. Several minutes later the train rounded a curve in the tracks at a speed of 80 miles an hour, which was within the allowable speed limit. The engineer saw the equipment as soon as it came into view, and immediately applied the emergency brakes. However, despite the engineer's best efforts, the train could not be stopped before colliding with the plaintiff's equipment. The train was travelling at a speed of about 70 miles an hour when it struck the equipment. The locomotive became uncoupled, became derailed, and proceeded down the tracks on the ties for a substantial distance. Fortunately, it did not overturn.

A part of the plaintiff's equipment was destroyed, and a part was damaged. The engine and five cars of the defendant's train, the defendant's tracks, its watchman's shack, its overhead electrical equipment, and other equipment suffered substantial injury.

Defendant's Position

The plaintiff was grossly negligent in the following respects:

(1) Driving his equipment over the crossing without making any effort whatsoever to ascertain whether, because of the unusual length

and weight of the equipment and because it was built very low to the ground, the equipment could proceed across the tracks with safety.

(2) Knowingly selecting a route for such equipment which crossed defendant's tracks, and in deliberately and knowingly failing to select an available and convenient route which did not cross any railroad tracks.

203 (3) Operating this equipment over the State and County roads of Maryland without obtaining a permit as required by law.

(4) Failing to advise the defendant in advance that he planned to follow a route which would take this over-sized equipment across defendant's tracks.

Plaintiff's actions evidence a complete disregard for the safety of the passengers and crew on defendant's train, none of whom, through the merest chance, was injured by the collision. As a direct result of plaintiff's indifference to the safety of others, and his gross carelessness and negligence, the defendant has suffered substantial injuries to its property. The defendant's agents at all times acted with requisite care, but despite their best efforts, were unable to avoid the collision.

The plaintiff's complaint should be dismissed because any injury he may have suffered is due entirely to his own negligence as shown above. Judgment should be entered for the defendant on its counterclaim.

The intervening plaintiff's complaint likewise should be dismissed.

Stipulation

The defendant desires to stipulate that certain documents may be offered in evidence without formal proof of their authenticity, subject to objection as to their relevancy and materiality.

These documents include:

1. State of Maryland General Motor Vehicle Laws, 1954.
2. 1954 Supplement to the General Motor Vehicle Laws of the State of Maryland, effective June 1, 1954.
3. Photographs of the scene of the accident.

- 204 4. Photographs of the locomotive taken after the locomotive was repaired.
5. Labor Distribution Ledger showing cost of labor utilized to repair the defendant's locomotive.
6. Material Distribution Ledgers, showing cost of materials used in connection with repairing locomotive of defendant.
7. Bills from Pullman Company for repairs to Pullman cars.
8. Bill from Washington Terminal Company for temporary repairs to locomotive.
9. Work Sheets, material order sheets, and reports of change of wheels and axles of Washington Terminal Company relating to repair of three P. R. R. Coaches and two Pullman cars by the Washington Terminal Company.
10. Bill for Wreck Train Service submitted to the P. R. R. by the Washington Terminal Company.
11. Ledgers showing cost of labor for repairs to the P. R. R.'s T & S equipment and the catenary equipment.
12. M.W. 12 forms of the P. R. R. showing cost of materials used in repair of P. R. R.'s T & S equipment, catenary equipment and related equipment.

Settlement

Defendant will not settle this case on any basis which requires it to pay the plaintiff or the intervening plaintiff any sum of money.

/s/ Paul F. McArdle

/s/ James C. McKay

701 Union Trust Building
Washington, D. C.
Attorneys for Defendant

[Filed May 31, 1957]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 28th day of May, 1957, before the Court and a jury of good and lawful persons of this district, to wit:

John E. Rice

Charles H. Bost

Frank R. Kent, Jr.

Colbert A. Williams

Wilbur T. Taylor

Herman H. Price

Edward S. Hedrick

Jean C. Mihm

Grover C. Rhyans

Arthur L. Nichols

Michael A. Peters

Ernest T. Salter

who, after having been duly sworn to well and truly try the issues between Wilfred L. Miller and Alban Tractor Co., Inc., plaintiffs and Pennsylvania Railroad Company, defendant and after this cause is heard and given to the jury in charge, they upon their oath say this 31st day of May, 1957, that they find for the defendant against said plaintiffs, by direction of the Court.

WHEREFORE, it is adjudged that said plaintiffs take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiffs their costs of defense.

HARRY M. HULL, Clerk,

By /s/ Irene B. Burroughs, Deputy Clerk

By direction of Judge Alexander Holtzoff

[Filed July 18, 1957]

NOTICE OF APPEAL

Notice is hereby given this 18th day of July, 1957, that the plaintiff, WILFRED L. MILLER, and the intervening plaintiff, ALBAN TRACTOR CO., INC., hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this

Court entered on the 20th day of June, 1957, in favor of the defendant against said plaintiff and intervening plaintiff.

NEWMYER & BRESS

By /s/ Sheldon E. Bernstein
1001 Fifteenth Street, N. W.
Washington, D. C. (5)
Attorneys for Plaintiff

/s/ Joseph D. Bulman
800 Woodward Building
Washington 5, D. C.
Attorney for Intervening Plaintiff

Attorneys for Defendant
Covington & Burling
(James C. Mc Kay)

EXCERPTS FROM PROCEEDINGS

3 [Filed August 21, 1957]

Washington, D. C.

May 29, 1957

WILFRED LLOYD MILLER

* * * * *

DIRECT EXAMINATION

BY MR. BERNSTEIN:

* * * * *

4 Q. What is your business? A. Grading contractor.

THE COURT: What kind?

THE WITNESS: Grading and excavating contractor.

BY MR. BERNSTEIN:

Q. How long have you been in that business? A. Roughly ten years.

* * * * *

5 Q. Where do you actually conduct your excavating work--in what areas? A. In the Silver Spring and Washington area.

* * * * *

Q. Will you describe briefly what excavating and grading work is? A. It is any type of earth-moving operation such as the construction of roads and excavation of foundations and the grading and clearing of ground and anything that would pertain to heavy equipment work.

* * * * *

6 Q. Mr. Miller, calling your attention to January 25, 1955, can you state where you were that morning? A. We were located on a job in a section of Maryland known as Ardmore.

* * * * *

Q. About what time of the day was it when you decided to move your equipment elsewhere? A. I would say it was about three or three-thirty

7 Q. What equipment was it that you were going to move elsewhere? A. We were going to move a bulldozer and an earth scraper.

* * * * *

10 Q. In addition to the tractor that has been referred to, Mr. Miller, what other types of equipment were you going to move that day?

A. We were going to move the earth scraper, the pan, with the tractor.

THE COURT: You mentioned a bulldozer. Was the bulldozer separate?

THE WITNESS: The bulldozer and earth scraper are two separate items.

THE COURT: That is the tractor?

THE WITNESS: That is what we commonly call bulldozer.

* * * * *

BY MR. BERNSTEIN:

Q. Will you explain the difference between the terms bulldozer and tractor? A. A truck could be called a tractor and they also call a bulldozer a tractor, too.

* * * * *

11 Q. In addition to this bulldozer what other items or equipment were you moving that day? A. We were moving the earth scraper with the bulldozer on a truck-tractor, with a truck-tractor and a trailer, low-bed trailer, heavy equipment trailer.

Q. You refer to this earth scraper, is that sometimes referred to as a pan? A. Yes, sir.

* * * * *

Q. The tractor was on top of this low-bed, was it not? A. Yes.

Q. Was it fastened down or just standing on top of the low-bed?

A. It was choked up on the low-bed trailer with blocks.

12 Q. You mean it had blocks in front of its wheels so it couldn't move back and forth, is that correct? A. Yes.

Q. This so-called pan you referred to--how was that connected, if at all, to the low-boy? A. The pan has a huge tongue on it made of steel that fastens to the back of the bulldozer and on the back of the bulldozer there is two holes which a pin will go through to connect the tongue of the pan with the bulldozer. That is the way the earth scraper was connected with the bulldozer.

THE COURT: How many pieces of apparatus were connected together, two or three?

BY MR. BERNSTEIN:

Q. As I understand, the low-boy was connected to the tractor and the pan in turn was connected to the low-boy; is that correct, and on top of the low-boy was the--

THE COURT: What was in front?

MR. BERNSTEIN: The tractor, which is the motor part.

THE COURT: What was immediately behind the tractor?

BY MR. BERNSTEIN:

Q. The low-boy attached to the tractor? A. The truck-tractor.

THE COURT: What was behind the low-boy?

MR. BERNSTEIN: The pan, which was connected up--

13 THE COURT: What was on top of the low-boy?

MR. BERNSTEIN: The bulldozer.

BY MR. BERNSTEIN:

Q. Did we state it correctly? A. Yes.

Q. Will you describe roughly what this pan looks like, because we don't have an actual photograph of it? A. The pan is made out of steel, which has a bowl effect with four huge rubber tires on it, about six feet tall.

MR. BERNSTEIN: If the Court please, there has been taken a photograph of a similar rig-up with all these things on it. It is not precise in terms of measurement. It is similar enough; I think it might be illustrative.

THE COURT: I think it might be helpful.

MR. BERNSTEIN: The railroad agrees?

MR. MC KAY: We took the picture.

THE COURT: Very well.

MR. BERNSTEIN: May I offer that in evidence as Plaintiff's Exhibit No. 4?

THE COURT: It may be admitted for the purposes of illustration, and you may pass it to the jury if you wish.

(Plaintiff's Exhibit No. 4 was marked for identification and received in evidence.)

* * * * *

BY MR. BERNSTEIN:

14 Q. Is that roughly similar to the rig-up you were driving on the particular day in question? A. Yes, identical.

* * * * *

Q. Let's start from the front. The front item is the tractor, which hauls the whole thing? A. Is the truck-tractor.

Q. The long low body is the so-called lowboy? A. Lowboy trailer.

Q. The bulldozer with the blade on it is on top of the lowboy? A. Right.

Q. And the pan, or earth mover?

15 MR. BERNSTEIN: May it be understood that picture was offered only for illustration?

THE COURT: The Court admitted it for illustration. Don't let's repeat the same thing.

BY MR. BERNSTEIN:

Q. Mr. Miller, about what time did you depart from this other job with this rig-up on this particular day? A. I would say approximately around 4:30.

Q. Who was driving this rig-up? A. I was driving it.

Q. And as driver where would you sit? A. I would sit up in the cab of the truck-tractor.

16 Q. When you were sitting in the cab of the truck-tractor were you approximately the same distance from the ground as you would be in a conventional passenger automobile? A. No. The height in a truck-tractor is much greater than an automobile. You would be sitting, I would say equivalent to the top of the roof of an ordinary automobile.

Q. Where were you headed for when you left this particular job? Where were you going? A. We were going to Carroll Knolls, off Georgia Avenue, in Silver Spring.

Q. Is Carroll Knolls the name of a subdivision? A. Yes.

Q. Was there then construction work being undergone in that subdivision? A. Yes, there was.

Q. You were going to Carroll Knolls for what purpose? A. To do some grading work.

Q. Speak up, please. A. To do grading work for a builder of that subdivision.

Q. Had you made arrangements with the particular builder beforehand to come there on that job and do the work? A. Yes, I had.

Q. When were you to commence this work at Carroll Knolls? A. The next morning.

17 Q. Which would be January 26, 1955? A. Yes, sir.

Q. What kind of a day was it when you started out? What were the weather conditions, and so on? A. I would say it was a bright, sunny day, winter day.

Q. Will you describe as best you can recall -- strike that. Was there anyone else with you when you started out? A. The operator of the equipment was following me in a pickup truck.

Q. His name was what? A. Mr. William Lindsay.

Q. When you say operator of the equipment, you mean the man who would operate the bulldozer, who would actually operate the bulldozer while you were on the job? A. Yes.

Q. He followed you in a pickup truck? A. Yes.

Q. Will you describe as best you can recall your route that you travelled from the place you were leaving up to the time where you had this accident? A. We left Ardmore and come out on Whitfield Road and went up Whitfield Road until we hit Lanham Station Road, and then proceeded on down Lanham Station Road.

18 Q. Why did you select Lanham Station Road to travel down?

A. If I would have gone up Whitfield Road there is a sharp turn there. I didn't feel that we could negotiate that turn with the equipment, due to the length of the turn. There is a concrete island in the middle of Whitfield Road where it intersects Route 50 and I didn't think we could

negotiate that turn and I felt that there would be a heavy amount of traffic coming over the top of that viaduct at that time of the evening, and we would have a hard time executing that turn at Whitfield Road. So I decided to take the road with the least amount of traffic involved.

Q. In other words, if I understand, to reach that viaduct on U.S. 50 you had to keep going up Whitfield Road? A. Yes; that is correct.

Q. Approximately what time of the day did you arrive in the vicinity of the Lanham Station crossing? A. I would say, estimate roughly at 5:15.

Q. You don't know the precise time, I take it? A. No, I don't.

Q. As you approached that crossing, before you got to the actual crossing what were the weather conditions and light conditions, if you can recall? A. If I remember, they were very good at the time.

19 Q. Was there any sort of precipitation, rain or snow, or anything else? A. No.

* * * * *

Q. Was the sun still out? A. Yes, I believe it was.

Q. Did you have any trouble in visibility? A. I did not, myself.

Q. As you approached the crossing, what did you see? A. I saw the watchman standing down on the crossing, the intersection of the crossing and the road with a white paddle held above his head with the word "Stop" on the paddle.

* * * * *

Q. About where were you in relation to the first track when you saw the watchman as you have just described? A. There is a hill as you approach the crossing. We were at the top of the hill.

20 Q. Could you approximate the distance you were from the first of the tracks at that time? A. I would say approximately 150 to 200 feet.

Q. About what speed were you travelling at that time? A. I would estimate from four to five miles an hour. On approaching a hill

we would normally slow down to a very slow degree of speed.

Q. After seeing the watchman with this paddle held up with the word, "Stop" on it, did you do anything? A. We stopped there.

Q. You say you stopped there. You mean at this point about 150 foot away from the tracks? A. At the top of the hill; that is correct.

Q. What occurred next? A. We waited and a train passed.

Q. Going in which direction--in your terms was it going from your right to your left or from your left to your right? A. It came from my left and went to my right.

Q. Which would mean it was, that the train was bound away from Washington? A. Yes.

Q. You were stopped and this train passed? A. Yes.

Q. As the train passed, was the watchman closer to you than
21 the train or was he obscured by the train? Do you understand my question? A. Yes.

Q. Do you recall? A. Offhand I can't recall whether he was obscured or just what his position was.

Q. Where was your assistant, Mr. Lindsay, to whom you refer, at this time? A. He was directly in back of me.

Q. In this pickup truck you have mentioned? A. Yes.

Q. After this train went by, this train that was going away from Washington, what occurred next? A. The watchman took his paddle down and placed it between his legs, straddled his legs and placed the paddle upside down between his legs and waved me on, motioned for me to come down the hill.

Q. Will you physically describe how he motioned to you? A. I will just say he waved us on, like this.

Q. Were there any vehicles in front of you at that time? A. No, there was not.

Q. In other words, you were the first vehicle from the crossing?
A. That is correct.

22 Q. When he waved you on, as you described, and inverted the paddle, what did you do next? A. I proceeded to go down the hill at the

rate of four or five miles an hour until I come to the railroad tracks, and I believe we came to a stop again and looked up and down the tracks for any trains that might be coming in either direction.

Q. At that time did you have any familiarity with the train schedules of the Pennsylvania at this section of the track? A. I did not.

Q. When, if at all, had you previously been over this crossing? A. I don't recall. I don't believe I had been over it in a couple of years. I had never been with a piece of equipment.

Q. You say you came to a stop as you came to the track itself. Where was the watchman at this time? A. I believe the watchman stepped to the right of the tractor trailer unit and motioned for us to proceed again.

Q. Did you so proceed? A. I so proceeded.

Q. Would you describe what occurred then? A. I proceeded to
23 cross the intersection and started down the grade on the opposite side and the bottom of the trailer became lodged on the bed of the road. There seemed to be a slight incline or hump in the road there; as the curve of the railroad went around that area there seemed to be elevation, you might call a super-elevation there, and the bottom of the trailer became lodged on the bed of the road.

Q. When the bottom of the trailer became so lodged, where were the wheels of the tractor part of this rig? There are four wheels on the tractor part? A. That is correct. I would say the wheels of the tractor were about 13 to 20 feet beyond the railroad track.

THE COURT: You mean on the other side of the track?

THE WITNESS: Yes.

THE COURT: You were across that much?

THE WITNESS: That is correct.

BY MR. BERNSTEIN:

Q. How many wheels or sets of wheels were there on this so-called low-boy? A. There were 8 wheels on the lowboy trailer.

Q. Four in front and four towards the rear? A. They were

what is known as in tandem. There was one set of axles, two sets of axles on the low-bed trailer with 8 wheels; one axle in front of the other located at the rear of the trailer.

24 Q. Where were those wheels of that lowboy in relation to the tracks at the point where you got hung up? A. I would say those wheels were roughly in between the second and first track.

Q. How many tracks were there--by tracks I mean--count each two tracks as one track--were there one, two, three, four?

MR. BERNSTEIN: Can't we stipulate?

MR. MC KAY: Three tracks.

BY MR. BERNSTEIN:

Q. In terms of these three tracks, describe these wheels of this lowboy now. A. I would say the wheels of the lowboy were somewhere between the first and the second track.

Q. When you say first you mean the first ones you would have approached as you went to cross? A. The first ones I would have approached as I came across the crossing.

Q. Where was the earth scraper part of the rig-up at that time?

A. The earth scraper--it was 12 feet in back of the trailer, or so.

Q. So you mean that part of the equipment hadn't reached
25 the tracks yet; is that what we are to understand? A. I believe that would be correct.

Q. In other words, was the total rig-up with the tractor already crossing the tracks and the pan still not having come to the tracks?

A. I would say the pan was in the middle of the track but the rear of the pan possibly hadn't come to the tracks.

Q. In other words, the pan in itself straddling Track No. 1?

A. It would be straddling Track No. 2.

Q. You have said that you got hung up there. Will you describe what happened from the time--from the moment you got hung up?

A. The minute I got hung up I applied the full power to the engine of the truck-tractor to try to free the unit and I did this two or three times, and I believe the wheels spun or it just wouldn't break loose

from the railroad crossing. So I immediately jumped out and the operator of the bulldozer unit had jumped out of his pickup truck, too.

Q. You mean Mr. Lindsey? A. Mr. Lindsey; and I instructed him to get up on the bulldozer and try to start it and unload the equipment on the crossing to clear the crossing as quickly as possible.

Q. Did he get up on the rig-up? A. He jumped up on the seat and had just commenced to start it. There is two engines on the bulldozer. There is a gasoline engine and diesel engine. The gasoline engine has to be started to start the diesel. Mr. Lindsey, he was just in the process of hitting the starter button on the gasoline engine when the locomotive started to approach.

Q. In this process did you hear any kind of a buzzer or warning signal, or anything? A. I believe I did hear a buzzer go off in the shed on the left of the tractor trailer unit.

Q. This shed--was this the watchman's shed you refer to? A. I believe it was known as the watchman's shed.

Q. Now, sir, how long after you got hung up on this hump crossing did you hear the buzzer go off? What was the time interval there? A. I would estimate roughly 40 to 50 seconds; somewhere in that vicinity. It seemed to be immediately after we got stuck that it occurred.

Q. Did you observe the watchman at this time, the crossing watchman? A. Yes, I did.

Q. What did you observe about him? What did you see him do or say? A. He seemed to throw up his hands and become panic-
27 stricken when he heard the buzzer go off and I believe he ran in the shed and grabbed a red flag and started to run up the left side of the railroad track.

Q. That is the last you saw of him? A. That is the last I remember of seeing him.

THE COURT: In which direction did he run?

THE WITNESS: He run to the east.

BY MR. BERNSTEIN:

Q. Which would be towards Washington? A. No; it would be towards Baltimore or towards New York.

Q. When you heard this buzzer did it give you any ideas? A. I didn't know exactly what it meant but due to the condition of the watchman, his panic-stricken state, I anticipated that a train was coming.

Q. What did you then do? A. I got up on the side of the trailer and I think we started to wave our hands. The operator, Mr. Lindsey, and myself, we waved our hands in the direction of the train, trying to bring his attention to the equipment on the track to avert a collision.

Q. Did it do any good? A. No, it did not.

Q. Will you describe in your own words what happened then, the series of events? A. We stayed right there to the last minute, we
28 stayed with the equipment to the last minute, until we felt that our own safety was involved, in trying to stop the train, waving at the engineer and when we got so close that it became a question if we stayed there much longer we would have been hit with the equipment, we abandoned the equipment and took shelter in the front of the truck-tractor.

Q. Then what occurred? A. The train plowed into the equipment, scattering it in different directions.

Q. Did you see the train shortly before it actually hit the equipment? A. Yes. I would say I did.

Q. Did you see any sparks or hear any squeal of brakes or anything of that character? A. No. I just heard his whistle, that is all.

Q. Did the train appear to be slowing in any way? A. None whatsoever.

* * * * *

31 MR. BERNSTEIN: First I would like to offer in evidence as Plaintiff's Exhibit No. 5 a map of the area upon which counsel have already marked the route followed by this plaintiff, and for the Court and jury we have marked as No. 1 in red pencil the point from which he departed, and No. 2 as the intersection where the collision occurred.

32 THE COURT: It may be admitted.

* * * * *

THE COURT: This red line--whatever that red line is, it might be mistaken for a part of the printed map. Where did the collision occur?

MR. BERNSTEIN: At the intersection of the railroad track and that road where the No. 2 is.

THE COURT: If you don't mind, I will mark this with a blue pencil.

* * * * *

BY MR. BERNSTEIN:

33 Q. Mr. Miller, as I understand your testimony before lunch, as the train was approaching you and your assistant were attempting to wave the train down, is that correct? A. That is correct.

THE COURT: We have been over that. You have it as far as the point where he and his assistant jumped off.

MR. BERNSTEIN: I wanted to go back in some detail.

BY MR. BERNSTEIN:

Q. Did you get an opportunity to look up the track in the direction from which the train was coming? A. Yes, I did.

34 Q. When did you first see the train? A. I would say when it was approximately a mile or three-quarters of a mile away.

Q. Does the track, looking in the direction from which the train was coming, does the track continue in a straight line indefinitely?

A. No. I would say it continues in a straight line for approximately a mile and then I believe it starts to curve slightly.

Q. So that one could not see the train until it came around this bend? A. As the train came around the bend it would become visible.

Q. Did you have any trouble seeing it come around the bend?

THE COURT: He said he saw it a mile away.

BY MR. BERNSTEIN:

Q. Did you make any estimate of the train at which it was going?

A. Yes. I would say it was going--

THE COURT: Is there a record of the actual speed?

MR. BERNSTEIN: No. The railroad says they do not have a speed tape as many trains have.

THE COURT: Isn't there a tape kept?

MR. MC KAY: Not on this particular type of locomotive.

35 THE COURT: You may answer.

THE WITNESS: I would estimate the train was doing in the vicinity of 85 miles an hour or so.

BY MR. BERNSTEIN:

Q. On what do you base that estimate that you have made?

A. In my type of work we have to sight grades in by eye and then I have been a tail-gunner in the service, and we had range estimation in that type of work in the service.

Q. Have you had occasion to view various types of vehicles at different speeds, including high speed? A. Yes. I would say I have been on the Pennsylvania Turnpike, where the vehicles travel at a high rate of speed, and I would be able to estimate fairly closely just what speed a vehicle would be travelling.

Q. Have you in any work or activity that you have pursued had to judge the speed of high-speed vehicles, for example, like airplanes?

A. Just like I stated, when I was in the service.

THE COURT: Don't let's repeat. You are going over the same ground more than once. If the question of speed is an issue--

MR. BERNSTEIN: Since no speed tape was kept by the railroad the only thing we have is the observation of those who saw it.

THE COURT: I wouldn't consider this sufficient evidence.

* * * * *

BY MR. BERNSTEIN:

37 Q. * * * * * If you went down Whitfield Road in order to get on U.S. 50 and the overpass there would be a junction of Whitfield and U.S. 50; is that correct? A. That is correct.

Q. Could you draw on the blackboard a diagram of that junction between Whitfield and U.S. 50?

* * * * *

BY MR. BERNSTEIN:

39 Q. If I understand you correctly, had you proceeded on Whitfield instead of taking the route you did you would have gone up Whitfield in the direction of the top of the board; is that correct?

40 A. That is correct.

Q. And then you would have turned into U.S. 50 at the intersection you have shown there? A. That is correct.

Q. Now you have exhibited there something more or less in the shape of a boat. What is that supposed to demonstrate? A. That is a concrete island in the middle of the Whitfield Road with a grass strip. There are buffers between the left lane and the right lane.

Q. In order to have gotten on U.S. 50 and crossed the viaduct you would have turned left there? A. That is correct.

Q. What was it that precluded you, in your opinion, from taking that route? A. I felt that we couldn't have made that turn with the equipment due to that concrete island. I believe those lanes, the right and left lane, are approximately, maybe 12 feet wide and with the traffic coming up Route 50 over the hill which makes that hill a blind area in there, I believe that we could not have negotiated that turn with the equipment.

* * * * *

43 CROSS EXAMINATION

BY MR. MC KAY:

44 Q. Would you state what the overall length of this equipment was from the front bumper of the tractor to the rear wheel of the scraper?

A. I would approximate 67 or 68 feet.

Q. Do you have any approximation as to the total weight of this equipment? A. Would that include the truck-tractor and the trailer and the bulldozer and the pan?

Q. That is correct. A. I would say, estimate roughly around 27 or 28 tons.

Q. That is 54 to 56 thousand pounds? A. I would say that is what it was.

Q. Do you know the weight of the White tractor? It was a White tractor, was it not? A. Yes, it was.

Q. What was the weight of that? A. If I recollect correctly, I believe it was 8800 pounds.

MR. MC KAY: I believe we have stipulated as to the catalog pages of the bulldozer and the weight shown there--

THE COURT: If it has been stipulated you don't have to ask the witness about it. You can just read the stipulation into the record.

BY MR. MC KAY:

Q. The shipping weight of the D.C. tractor, 24,330 pounds.

45 What kind of cable control did you have? A. No. 25 cable control.

Q. The weight of the blade fitted for a No. 25 cable control is 5,552 pounds, and the weight of the cable control fitted for D.C. was 1,965 pounds--fitted for D.C. 7, was 1,965 pounds. Referring to the trailer, do you know what the clearance of the trailer was from the roadway to the underneath part of the bed? This is unloaded. A. Truthfully I don't know what that clearance was. The trailer was a factory-constructed trailer and it was similar to other trailers.

* * * * *

48 MR. MC KAY: Defendant's Exhibits Nos. 3 and 4--I should not offer this now, should I?

(Defendant's Exhibits Nos. 3 and 4 were marked for identification.)

THE COURT: You have a right to offer exhibits during cross-examination. I know under the old practice that was not permissible. I think it is permissible under the new practice. Are you offering them in evidence?

MR. BERNSTEIN: No objection.

THE COURT: Admitted.

* * * * *

BY MR. MC KAY:

49 Q. Mr. Miller, for how long a period of time had you had possession of this particular equipment which you were driving that day?

* * * * *

THE WITNESS: To my recollection we had owned the trailer from the year of 1951 and the bulldozer was 10 months old and the White tractor--I couldn't definitely answer-- I don't recall just how old that was; and the earth mover, or earth scraper, was a unit that we had borrowed and we had just picked that up a week or so prior to that.

* * * * *

BY MR. MC KAY:

50 Q. Had you moved this or similar equipment, and I am now referring to all of the pieces of equipment, over the roads in Maryland prior to this date? A. Yes, I had.

Q. And on how many occasions would you say you had done that? A. I couldn't give a figure but I would say on numerous occasions I had moved the equipment.

Q. Over a period of what--two years would you say? A. Yes; two years.

Q. You had not put your trailer into commission until some time in 1953, had you? A. I believe that is correct.

* * * * *

54 THE COURT: I will rule this, that if there is a rule under the Maryland statutes or regulations that this type of equipment or this weight of equipment could not be driven over this particular type of crossing or this specific crossing, of course I will let you show that. Whether a permit was required, or not, to so drive, is an entirely different matter. In other words, the law permitted him to drive it or it did not. If it did not, then the fact it did not would be admissible, and he would be violating the law. That would be proof of negligence, some proof of negligence. But the fact that he did not have a permit
55 would not have any proximate casual relationship to the accident.

* * * * *

59 MR. BERNSTEIN: You said this was all on the assumption a permit was required. We have statute authorities that permit was not required. They have not put in any evidence. It is not

required on a county road.

THE COURT: Where does that show?

MR. BERNSTEIN: On page 4 of our memorandum; Section 82 Article 66-1/2, which they themselves quote.

THE COURT: The State Department has ruled that it does not apply to county roads. I am going to construe that highways of the 60 state means highways within the state and not highways belonging to the state.

MR. BERNSTEIN: On the face of the permit form it shows the same thing.

THE COURT: I am going to admit it. Then you can show the contrary.

(Open Court:)

BY MR. MC KAY:

Q. Mr. Miller, at the time you were making this trip from Ardmore and going toward Silver Spring did you have a permit to make this trip issued by the State Roads Commission of the State of Maryland?

MR. BERNSTEIN: Objection.

THE COURT: Objection overruled for the reasons stated at the bench conference.

THE WITNESS: I had a permit that covered me within a five-mile radius of Four Corners, Maryland.

MR. MC KAY: Would you mark this defendant's exhibit?

THE COURT: You say within a five-mile radius of Four Corners?

THE WITNESS: Yes.

BY MR. MC KAY:

Q. How far is this crossing from Four Corners? A. I would say it is about eight or ten miles.

(Defendant's Exhibit No. 5
was marked for identification.)

BY MR. MC KAY:

61 Q. I show you a document which has been marked Defendant's Exhibit No. 5 and ask you whether this is the permit which you had at that time, or a copy thereof.

MR. BERNSTEIN: We will stipulate that it is.

THE WITNESS: Yes. I believe it is.

MR. MC KAY: Could I read portions of this permit?

THE COURT: It is in evidence?

MR. MC KAY: It is not in evidence. Could I offer it?

THE COURT: Yes.

(Defendant's Exhibit No. 5
was received in evidence.)

MR. BERNSTEIN: I do not object to this particular exhibit. I maintain my objection.

* * * * *

THE COURT: On what ground?

MR. BERNSTEIN: On the ground previously stated.

THE COURT: Objection overruled. Those grounds do not apply to this document. You may read any portion of this that you wish, Mr. McKay.

MR. MC KAY. I am reading from a document which is entitled "State of Maryland, State Roads Commission, Special Hauling Permit issued December 31, 1954 to W. L. Miller.

62 "To haul or move Caterpillar D.C. Bulldozer and towpan on La Crosse trailer towed by White tractor. To move over the Maryland State highway system within a five-mile radius of Four Corners. No bridges are to be crossed when gross weight of vehicle and load exceeds the bridge limitation.

"This permit does not cover over any roads not maintained by the Maryland State Roads Commission. Permittee must have extra flagmen when towing pans because of possible hazard."

* * * * *

MR. MC KAY. On the back of this permit, under "General

Conditions" I neglected to say that the permit also states that it is granted "under and subject to the motor vehicle laws of the State and general and specific instructions under which all special hauling permits are issued, and to the following regulations."

General Conditions on the back, No. 2, says as follows:†

"Nothing contained in the special hauling permit shall be construed to confer authority upon the permittee to cross or attempt to cross any bridge or other structure other than those under the control and jurisdiction of the State Roads Commission and for which the Commission is responsible for construction and maintenance, nor the right to cross any bridge or structure or any railroad or railway tracks at grade until after due and sufficient notice of such proposed crossing shall have been given to the authorities responsible for the construction and maintenance of the bridge or structure or to the track supervisor or other authorized agent of the railroad or railway company and proper arrangements made for such crossing, provided, however, that any damage caused to any such bridge or other structure by the operation of the vehicle shall be the responsibility of the permittee."

* * * * *

(Bench Conference:)

MR. BERNSTEIN: If the Court please, the permit shows on its face, which I attempted to show the Court, these permits issued by the State Roads Commission do not apply to other than State roads. Since the permit does not apply to other than state roads, the conditions can not apply to other than state roads.

THE COURT: That is a matter for argument.

MR. BERNSTEIN: It says on its face--

MR. MC KAY. It says he can only go over state roads.

MR. BERNSTEIN: It says this permit does not cover any roads not maintained--

THE COURT: I construe this is only a permit so far as state roads--

MR. BERNSTEIN: This was a county road. That is what the administrators are going to come and testify.

THE COURT: I have ruled on that. I have admitted it.

* * * * *

BY MR. MC KAY:

66 Q. Do you know what the approximate weight of the trailer was just prior to the accident, Mr. Miller? A. I would say it was in the-- it weighed in the vicinity of 10,000 pounds.

* * * * *

Q. Is it not a fact that both Ardmore and Lanham are beyond the five-mile radius of Four Corners? A. Yes.

Q. This permit which permitted you to operate within a
67 five-mile radius, did this cover the various equipment that was involved in the accident? A. Yes.

Q. I note that the permit states that you were required to have additional flagmen. Did you have additional flagmen on the trip you were taking on the day of this accident? A. I think it specifies flagman on the permit; one man -- and the operator would be the flagman.

* * * * *

THE WITNESS: It is normal procedure to have one man with a flag with the unit. That is the intent of the permit.

BY MR. MC KAY:

Q. You had one man that day? A. The man in the pickup, the operator, would act as the flagman.

Q. Prior to making the trip on January 25 from Ardmore toward Silver Spring, did you get in touch with the track supervisor of the Pennsylvania Railroad? A. No, I did not.

Q. Did you attempt to get in touch with him? A. No, I did not.

Q. Prior to this trip did you get in touch with any other
68 agent of the Pennsylvania Railroad? A. No.

Q. Did you attempt to get in touch with any such agent? A. No, I did not.

* * * * *

MR. MC KAY: I would like to offer in evidence Defendant's Exhibit No. 6, which is a copy of a permit issued January 4, 1955,

to permit the hauling of equipment from Silver Spring to Ardmore.

69 MR. BERNSTEIN: Objection, as having no possible relevancy.

THE COURT: Objection sustained.

* * * * *

BY MR. MC KAY:

Q. Now, Mr. Miller, as I understood your testimony you started up the Whitfield Chapel Road from Ardmore; is that correct?

A. Yes, it is.

Q. Is it possible to go from Ardmore to Silver Spring down the George N. Palmer highway and on over by other roads? A. It is.

Q. Have you travelled that route? A. It is a much longer route and it is out of the way. I believe we had travelled it before.

Q. There are no grade crossings to cross on that route, are
70 there? A. No; but the traffic is very heavy at Peace Cross coming that way.

Q. Also I believe you testified that once having started up Whitfield Chapel Road you could conceivably, or it is possible to go all the way out to Route 50 and turn left and cross the over pass; is that correct? A. No. I conceded that it wasn't possible to make that turn up there at Route 50.

Q. Have you ever tried to make that turn with this rig? A. No, I did not.

Q. Had you ever tried to make the turn off Lanham Station Road onto Route 50? A. No, I had not.

Q. Were you familiar with that turn? A. No, I wasn't; not too familiar.

* * * * *

71 MR. MC KAY: I believe I asked when was the last time he saw the turn from Lanham Station Road into Route 50.

THE WITNESS: I can't remember.

BY MR. MC KAY:

72 Q. Did you ever see it? A. That I truthfully couldn't answer, either.

* * * * *

Q. Isn't it a fact, sir, that he did not wave you to come on while you and your equipment were at the top of the hill? A. No. It is not a fact. He did wave me on when I was on the top of the hill.

* * * * *

73 Q. Isn't it true that you did not stop this equipment until a portion of the front end of your tractor was across Track No. 1? A. That statement would be untrue. I stopped before I got to the railroad crossing and looked for trains to the right and left; made a complete stop.

Q. Did you speak to the watchman? A. No. I did not speak to the watchman.

Q. Had you ever seen the watchman before? A. I never had seen the watchman before.

Q. To your knowledge, had he ever seen your equipment before? A. That is something I do not know.

Q. You did not ask him to examine your rig, did you? A. No, I did not.

Q. By the same token, I take it you did not tell him anything about the length or its weight; is that correct? A. I thought he could see. It was very visible; a big piece of equipment; he could see to what extent it consisted of.

Q. You knew yourself that it was big equipment, of course? A. Yes, I did.

Q. Did you study the crossing at all before you moved on
74 to the tracks; that is, the crossing ahead of you? A. Yes, I did.

Q. Did you see any hump?

* * * * *

THE WITNESS: Due to the height I was sitting in the truck I did not see any hump. It was not visible from my angle, from the height of my seat in the truck-tractor.

BY MR. MC KAY:

Q. Had you been across this crossing before in your own

automobile? A. Years before I might have crossed it. I can't definitely remember when I had crossed it. It had been quite a while.

Q. Do you remember seeing any hump when you crossed it in your own automobile? A. I wasn't looking for any hump, if I had crossed it at that time. I wasn't looking for a hump. If I had crossed it I possibly didn't notice it.

Q. You don't remember whether you noticed it or not? A. I don't remember.

Q. Did you know that this was a mainline track of the Pennsylvania Railroad Company? A. No, I did not.

75 Q. You did not know this was the mainline from Baltimore to Washington, D. C.? A. No, sir.

Q. When you got close to the crossing did you then realize it was a main line track? A. No, I did not.

Q. Did you notice there were three tracks? A. At the time I might have noticed that there were three tracks.

Q. Now, Mr. Miller, after you got struck, sir, I think you said you attempted to move forward what, three times? Did you make three efforts? A. I think it was something to that effect.

Q. What did that involve, stepping on the accelerator and trying to move forward? A. And bucking the clutch; bucking the pull with the truck-tractor.

* * * * *

Q. You did hear the buzzer sound; is that correct? A. That is correct.

76 Q. And you say that the watchman panicked at that point? A. I thought he did.

Q. What did he do that made you think he panicked? A. Well, he seemed to wring his hands and just became terrified and from his outward appearance he seemed to me he was very stricken at the time.

Q. Did he not immediately start up the track with his red flag in the direction in which the train was coming? A. He did not have his red flag with him. I think he run in the shack and got his red flags and

then run up the tracks.

Q. He did that immediately after the buzzer sounded? A. That I couldn't state.

Q. When you were looking at this train I believe you said you were looking at it as it was coming head-on towards you; is that correct? A. That would be correct.

Q. You were able to judge the speed at 85 miles an hour from that angle; is that your testimony? A. I would say so.

Q. And the other experiences of judging speed did you not judge from a side view rather than a head-on view? A. Not necessarily.

Q. Tell me, when you judged speed from a head-on view
77 previous to this occasion. A. Well, like I said before, I was in the Air Force and, being a gunner, we had range estimation on aircraft at 300 or 400 miles an hour. We had to judge our speed and use deflection in that type of shooting.

Q. Have you ever judged the speed of any object on the ground from a head-on position coming toward you prior to this occasion? A. I don't believe I have had reason to.

Q. You may have testified to this but you did know, did you not, that there was an overpass over the railroad tracks on Route 50? A. I did.

Q. And is it not true that by cutting left on Lanham Station Road and going toward Route 50 you would have saved yourself about a half mile in distance? A. I would say that is a true statement.

Q. Where was the train when you jumped off your rig? A. I know he was mighty close to us.

Q. And your testimony is that you could see him from a mile away; is that correct? A. I would roughly estimate a mile.

Q. How far beyond the overpass was he when you first saw him;
78 can you judge that? A. I wouldn't want to estimate a judgment on that distance. I don't know what the distance is from the curve to the overpass. I wouldn't want to make an estimate on that. I don't feel qualified to estimate that.

Q. You are qualified to estimate a moving train at 85 miles an hour? A. I didn't say I was qualified. That was my personal opinion.

Q. You really don't know how far the train was from you? A. I am making an estimate.

* * * * *

REDIRECT EXAMINATION

BY MR. BERNSTEIN:

79 Q. Is the scraper that was tied on the back rigid with the body of the trailer or does it move up and down?

MR. MC KAY: He testified to this. I don't believe this is proper redirect.

MR. BERNSTEIN: You agree that it isn't rigid?

MR. MC KAY: I don't know.

THE COURT: I will allow this question.

THE WITNESS: It is not rigid. It is flexible. It is not part of the trailer unit.

BY MR. BERNSTEIN:

Q. With respect to this permit about which Pennsylvania Rail-
80 road counsel asked you, and particularly the clause reading:

"This permit does not cover over any roads not maintained by the Maryland State Roads Commission", the road, the Lanham Station Road, on which this accident occurred, was that a Maryland State road? A. No. This was a county road and we felt that we were not required to have a permit on this road.

Q. Was the trailer and tractor and the equipment you had on the road that day fully licensed by the State? A. Yes, it was.

MR. MC KAY: Objection.

THE COURT: Overruled.

BY MR. BERNSTEIN:

Q. And the licensing of that equipment--

THE COURT: I think you opened the door for that, Mr. McKay.

BY MR. BERNSTEIN:

Q. --the licensing of that equipment with the weights, length and

so on, fully specified in your application for licenses? A. That is correct.

Q. And those licenses were in force at the time of this accident?

A. That is correct.

81 Q. Counsel asked you whether you attempted to move this rig up backward when you got hung up. Can the rig-up be moved backward?

A. A unit of that size can not be backed up.

Q. If I understand you, what you attempted to do was rock it with the clutch. A. That is correct.

Q. That is what you did on that occasion? A. That is what I did.

* * * * *

RECROSS EXAMINATION

BY MR. MC KAY:

Q. Do I understand that this rig can not be backed up at all?

A. I would say it could be backed up until the pan would jackknife. It would only be a matter of a few feet. It couldn't be backed up enough to get off the grade crossing.

Q. If you were on the grade crossing and got stalled, you could not back up? A. It was impossible to back up any unit of this size.

Q. You knew that it could not be backed on the day of this accident, did you not? A. That is correct.

Q. Highway 50 is a state highway, isn't it? A. That is correct.

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WILLIAM HERBERT LINDSEY

* * * * *

DIRECT EXAMINATION

* * * * *

BY MR. BERNSTEIN:

* * * * *

82 Q. By whom are you employed? A. Wilfred L. Miller.

Q. That is the Mr. Miller who sits at my right-hand here?

A. Yes, sir.

* * * * *

83 Q. What is your employment with him? What do you do? A. I am a 'dozer operator.

Q. You mean a bulldozer operator? A. That is right.

* * * * *

Q. Were you employed by Mr. Miller at the time of this accident on the Pennsylvania Railroad crossing near Lanham, Maryland? A. Yes.

Q. Where were you and Mr. Miller coming from on that occasion? A. We was coming from the job that I had just finished. I believe it was the subdivision known as Ardmore.

Q. Where were you headed to? A. Silver Spring.

* * * * *

84 Q. At the time what type of vehicle were you riding in? A. An F-3 Ford pickup.

Q. Were you riding to the rear of Mr. Miller? A. That is right.

Q. And he was driving this tractor rig-up with all the equipment? A. That is right.

Q. Just before you came to this particular crossing where the accident occurred, the truck was in front of you, was it, that Mr. Miller was driving? A. It was in front.

Q. Can you state whether or not that tractor-trailer driven by Mr. Miller stopped before it came to the railroad crossing? A. He stopped before he came to the crossing.

Q. And about how far was he from the crossing at the time that he stopped? A. I can't state exactly how far he was. I was approximately 125 to 130 feet.

Q. Did Mr. Miller come to a complete stop? A. That is right.

Q. At that time, or shortly thereafter, did a train pass on the crossing? A. I believe it was a northboud train. It was going
85 toward Baltimore. They call it north.

Q. At that time could you see the center of the crossing? A. No.

Q. Why not? A. I was following the pan that was on the tractor and trailer and I was close and in that way I can't see ahead of me. I

can see to either side but I can't see ahead.

Q. Did there come a time when the rig-up, the tractor and trailer that Mr. Miller was driving, started up again? A. That is right.

Q. Will you state what occurred from that point? A. We proceeded on. Mr. Miller started and I was right behind. I was, I would say, five or ten feet behind the push-a-block of the pan and he proceeded on across the tracks.

Q. About how fast was he proceeding? A. I would say four or five miles per hour at the most.

Q. Will you go on? A. And then he stopped. The pan was almost on the first set of tracks.

Q. When you say first tracks, you mean the first ones you would have come to in crossing? A. That is right.

Q. Go ahead. A. Then the front of the pickup was almost on it, 86 because I was right behind and he stopped. I thought to myself, what is he doing? He has made a fool of himself stopping on the railroad track. So I backed up the pickup. I hadn't never crossed. I couldn't cross because he was in front. I backed the pickup up and I run around and about that time I met Mr. Miller.

Q. Did you get out of the pickup first? A. That is right. I got out of the pickup.

Q. So you ran on your own feet? A. That is right. I met Mr. Miller and Mr. Miller said there must be a train coming and to get it off. I am talking about the tractor and pan. In the meantime I had seen the watchman going up the track with a flag in his hand, and it was wintertime. I had a piece of plywood on the side of the tractor to get heat from the engine to keep warm and I pulled that off and Mr. Miller was hollering to get it off and I told him to throw some blocks down.

He was standing behind the rear of the tractor in between the front of the pan--you have a tongue which is about 8 feet, approximately 8 feet. I don't know whether he called my attention to a train coming

or whether I looked up and see it. I hit the starter. You have two engines on these Cats. One of them is a little engine to warm your big engine up. I had hit the starter but it didn't start right off. In the meantime he called my attention, or I had seen this train coming on
 87 Route 50 under the underpass. I stood up. I thought he was going to stop. So I stood up and waved my arms. So Mr. Miller hollered for me to get off. He kept coming--

Q. He kept coming--you mean the train? A. The train. So I done the natural thing. After Mr. Miller took off I took off.

Q. When you saw this train coming, how close was it to your rig-up before you stopped looking at it and tried to get out of the way?

A. I got out of the way.

Q. I know you did or you wouldn't be here. How far was the train from the rig-up at the last point you saw it before you jumped away? A. He was two good, long blocks away.

Q. Could you see the train perfectly clearly at that time?

A. That is right. I could see the train clearly.

Q. Did you hear any screeching of brakes or did you see any sparks flying through the wheels or anything of that character from the train? A. No.

Q. Did the train seem to be slowing up or slacking up the speed? A. He didn't slow up; not that I could tell.

* * * * *

Washington, D. C.

May 31, 1957

BY MR. BERNSTEIN:

95 Q. Can you state where the front end of the tractor-trailer or combination was, not of your car, but of the tractor-trailer combination in relation to the first track of the railway when it stopped?

A. The second time, or just before the train proceeded?

Q. Let's take the first time. You came over the hill and there was a stop? A. The pickup wasn't over the hill.

Q. You weren't quite over the hill? A. That is right. I wasn't

quite over the hill.

Q. Was the tractor-trailer combination over the hill? A. He was going down the hill.

Q. He stopped at that point? A. That is right.

* * * * *

97 Q. Can you state where the front of the tractor was, the distance it was from the first track the first time it stopped toward the top of the hill? A. The tractor-trailer, approximately 70 feet-- a few feet one way or another.

* * * * *

THE WITNESS: With the equipment being about 70 feet long, I was quite a ways back, being at the far end of it. I was back over the hill. I didn't know there was railroad tracks down there. I didn't know what he stopped for.

BY MR. BERNSTEIN:

Q. The first time he stopped you can't approximate the distance?

THE COURT: He said that last time.

BY MR. BERNSTEIN:

Q. The second time that the tractor-trailer stopped can you approximate the distance from the front of the tractor to the first track? A. I was approximately 125 feet, a few feet one way or the other and it being 70 feet--I will have to get pencil and paper and figure it up.

* * * * *

CROSS EXAMINATION

BY MR. MC KAY:

98 Q. You say the rig was about 70 feet long; is that your testimony? A. That is approximately. I have never measured it.

* * * * *

Q. Would you tell us what the duties are of a flagman when this kind of equipment is operated? A. With a piece of equipment that long you have to stand on right-hand lane on a dual street, have the rig to make a left-hand turn because of the length. The duty of a

flagman is to be in the lefthand lane to warn people and it goes vice versa, when you are going to make a right-hand turn you have to be in the left lane.

My duty is to be in the right lane to warn people to keep them from passing on the right and having an accident.

99 Q. If you make a left-hand turn do I understand correctly that you go up the street into which you are turning and warn traffic coming that way and hold traffic off? A. I have never blocked traffic. I stop them back of the rig. I never went ahead. The driver of the tractor and trailer can see ahead.

* * * * *

Q. Do you have any duties when a rig such as this crosses a railroad track at grade? A. Not that I know of.

* * * * *

100 Q. What time did you leave Ardmore that day, Mr. Lindsey? A. It was approximately between a quarter of 5:00 and 5:00 o'clock.

Q. Did you have a discussion with Mr. Miller before you left Ardmore as to the route which you would take? A. Not that I can recall.

Q. Had you travelled between Ardmore and Silver Spring with this equipment before? A. No, I had not.

Q. You did not come over with the equipment when it came to the Ardmore job; is that correct? A. I moved it there.

Q. Did you not come from Silver Spring to Ardmore? A. I came from Hyattsville.

Q. Did you follow the route which took you over the Lanham Station Road at that time? A. No.

Q. Did you follow any route which took you over a grade crossing of railroad tracks at that time? A. Yes.

101 Q. You went over grade crossings? A. State what you mean by grade crossings.

Q. I mean over actual tracks as opposed to an overpass, let's say. A. No, I never crossed tracks.

* * * * *

Q. Did Mr. Miller tell you where you were going before you started off on that trip that day? A. As I recall he said Silver Spring.

Q. He did not mention the route; is that correct? A. That is right.

Q. You just got in your car and followed on behind; is that correct? A. It was his truck.

* * * * *

102 Q. As of the day of this accident, before it occurred, did you know there was a grade crossing at Lanham?

* * * * *

THE WITNESS: I had never crossed a crossing at Lenham.

BY MR. MC KAY:

Q. Did you know it was there? A. No.

* * * * *

103 Q. I believe you testified as you reached the top of the hill you saw a train go north; is that right? A. That is right. I could see off to the side.

104 Q. Was that a passenger train? A. I believe it was. I would not swear to it.

* * * * *

Q. Did you see the watchman at all before the equipment got stuck? A. No, sir.

Q. You said after the equipment stopped on the railroad tracks you wondered why he had stopped. How long did you sit in your truck before you got out of that? A. Before I got out?

Q. Yes. A. I didn't sit there any length of time. I backed right up, the pickup.

Q. You backed the pickup; and then what did you do? A. I jumped out and run around to see what was wrong.

Q. Was the train then in sight as you approached the equipment?
105 A. No, sir.

Q. What did you do? Did you get on the equipment? A. That

is right.

Q. Who saw the train first--you or Mr. Miller? A. I stated the other day that I don't know whether I saw it first or he called my attention to it.

Q. Do you think you saw it about simultaneously, the same time?
A. That is right.

Q. You looked up and looked down the tracks; is that correct?
A. That is right.

* * * * *

Q. How far was the train away from you when you saw it the first time? A. Route 50 underpass.

Q. How long between the time Mr. Miller hollered and the time that Mr. Miller left the equipment? A. For me to get off.

Q. Between the time you both saw the train and the time Mr. Miller left the equipment, how many seconds would you say it was?

106 A. It is hard to say how many seconds. I would say five or ten.

* * * * *

RICHARD HARRISON STANCLIFF

was called as a witness by and on behalf of the Plaintiff,

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DIRECT EXAMINATION

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BY MR. BERNSTEIN:

107 Q. Mr. Stancliff, what is your residence address?

THE COURT: I suggest you stand up here. He can talk loud enough.

THE WITNESS: Lanham, Maryland.

BY MR. BERNSTEIN:

Q. What is your occupation? A. I have a partnership with my brother in the hardware business.

Q. Where is that hardware business located? A. On Route 50 in Lanham.

Q. How long have you been in business there? A. 8 years.

* * * * *

Q. In the course of your activities, whether business or otherwise, did you have occasion to cross the Lanham Station Road and particularly the railroad tracks at the Lanham Station route?

108 A. Yes, sir.

* * * * *

Q. How frequently would you cross the tracks on the Lanham Station Road? A. I would say on an average of six or eight times a day.

Q. Did you have occasion to be crossing those tracks on the Lanham Station Road late in the afternoon on January 25, 1955?

A. Yes, sir.

Q. Did you cross them or start to cross shortly before an accident occurred between a railroad train and certain construction equipment? A. Yes, sir.

Q. What direction were you travelling as you approached the crossing? A. In what direction has it been established the railroad is running at that point?

Q. Were you travelling in the same direction as the construction machinery was travelling or in opposite direction? A. In the opposing direction.

109 Q. Will you state what you saw as you approached the crossing?

A. As I approached the crossing I noticed Mr. Miller's equipment coming towards me at a very slow rate of speed.

Q. When you say very slow, could you approximate that rate of speed? A. Approximately three miles an hour.

Q. Would you continue? A. Well, realizing that it wasn't room enough for me in my truck and Mr. Miller's equipment, I pulled up within, I would say 20 feet of the railroad, right beside the watchman's box over to the right and stayed there until Miller came across the railroad.

As he came across the railroad his equipment bogged down on the knoll on the high side of the railroad.

Q. You say on the knoll? A. Yes, sir. As his tractor came off the crossing and went down the hill his lowboy settled down on top of the knoll of the crossing and at that time he tried to go forward; he tried to go backward; and he couldn't move it. So, realizing the frequency of trains at that crossing I backed my truck up, turned around and went down to the bottom of the hill approximately 100 feet from the crossing in order to be out of the way.

110 I got out of my truck and was going to go back to the crossing to see if I could give any assistance, at which time I saw the approaching train coming down the tracks.

Realizing there was nothing I could do, I just stood beside my truck and watched the crash.

* * * * *

Q. As you first approached the crossing had you seen or heard any other train--I am speaking about a train other than the one that struck that equipment. A. As I was on Route 50 going towards the Lanham Station Road there was a train that went by.

Q. Which was that--southbound or northbound? A. That was a southbound train, to the best of my knowledge.

Q. As you first saw the crossing, coming down towards it, did you see the watchman at the crossing at all? A. Yes. The watchman was standing beside his box off to the right of the road, with a stop sign in his hand, upside down resting on the roadway.

Q. When you say stop sign upside down, you mean with the round part that has the word "stop" inserted? A. Yes, sir.

111 Q. Where was he looking? A. He was watching Miller approach the crossing.

Q. Did he look at you at all. A. Not that I know of.

Q. To your knowledge, did he keep his attention focused on Miller? A. To the best of my knowledge, yes.

Q. Did the watchman give you any sort of signal at all? A. No, sir.

Q. Was the tractor coming down the hill toward the crossing,

this tractor trailer? A. He had not actually gotten onto the crossing before I came to a stop.

Q. At any point before the tractor trailer got to the crossing, before it ever entered upon the tracks, did you observe whether or not any signal was given by this watchman to the tractor-trailer?

A. No, sir.

Q. Do you know whether he did or didn't? A. I can't say for sure.

Q. But you do know he was focusing his attention to the tractor trailer with the sign inverted? A. Yes, sir. If Miller's equipment had not been there, I would have gone across myself.

112 Q. From your experience in using this particular crossing where the railroad crosses the Lanham Station route, have you encountered any difficulties making that crossing? A. Well, approximately four years ago over the crossing my muffler dragged at a point on the crossing.

Q. What kind of vehicle were you driving at that time? A. I had a '39 Plymouth at the time.

Q. Was that a '39 Plymouth of ordinary construction, or was there anything extraordinary about the construction or design?

A. Ordinary construction.

Q. Mr. Stancliff, I hand you two photographs of this crossing which are Plaintiff's Exhibits Nos. 6 and 7, which are already in evidence, and ask you if you can point out for the jury on these photographs approximately the point at which your muffler dragged on this occasion that you speak of?

Point to that place. A. I would say it would be approximately at that point (indicating).

MR. BERNSTEIN: May we have a red pencil mark put on by the witness at that point?

THE COURT: Yes.

BY MR. BERNSTEIN:

113 Q. Would you mark that point on the photograph with red pencil.

* * * * *

Q. Can you describe the condition and grade or level I am speaking of now at that crossing at the point where you start leaving the tracks going in the direction from which you were coming--in other words, in the direction in which this rig was moving? Do you understand my question? A. You mean describe the full grade of the crossing?

Q. Describe the condition of the road going up to the tracks in the direction in which the truck was proceeding, in the direction in which you were proceeding. A. The approach to the railroad is coming downhill and it continues to do so until you reach the railroad.

Q. You are speaking now in terms of the direction the truck was moving? A. That is right. As you actually go on to the railroad, the first set of rails will slightly go uphill and then the second set of
114 rails will go up a little further. The third set of rails will go up even further, at which time, after you get over the crossing it drops right off downhill again.

* * * * *

Q. Is the grade--you know what I mean by grade, don't you? A. Yes.

Q. From the point where you leave the tracks going in the direction from which you are coming--in other words, this direction was coming in--is the grade exactly constant or is it irregular? A. Irregular.

Q. As you go down-- You have crossed the tracks and, going in the direction of the truck, does it tend to level up or does it drop down, or what? A. It constantly drops off.

Q. Is it fair to say you get a sort of overall hump effect if you have a long enough vehicle? A. I would say so.

115 Q. Did you observe the train for a number of seconds prior to the actual impact with this construction equipment? A. I saw the train first at about the whistle sign.

Q. Where is the whistle sign? A. That is north of the

crossing. I don't know how many feet. It is quite a ways.

Q. Is it somewhere in the vicinity of that overpass? A. It is between the crossing and the overpass.

Q. You saw it there first. Will you state at what time you saw it again? I don't mean by the clock but in relation to point of the accident. A. I kept my eyes on it. At intervals I was watching the action at the crossing. In other words, Mr. Miller's assistant was there trying to start the bulldozer in order to run it off the lowboy to lighten the load.

Q. Is it fair to say that your eyes were going between both the train and this rig to see what would happen next? A. That is correct.

Q. That was more or less continuous up until the time of the crash? A. That is right.

Q. Did you see any signs of sparks flying from the wheels or screech of brakes or anything of that character? A. I couldn't say I did; no, sir.

116 Q. Was there anything your eyes or ears could tell you that there was being an application of brakes on that train? A. No, sir.

THE COURT: What was the question.

MR. BERNSTEIN: Was there anything in your senses, your eyes or ears, which would give you a sensation that brakes were being applied.

BY MR. BERNSTEIN:

Q. Was there, to your observation, any appearance of the train slowing down at all? A. No, sir.

Q. What were the light conditions in the matter of the last few seconds before the crash--I mean visibility. A. Very good I would say. It wasn't dark.

Q. Anything that you could observe that would impede vision in terms of weather or light? A. No, sir.

Q. Did you see that watchman at any time make any formal signal to Mr. Miller to stop? A. No, sir.

Q. Could you make any approximation of the speed of the train

up until the last few seconds before the crash? A. Approximately 90; 85 miles per hour.

* * * * *

CROSS EXAMINATION

* * * * *

BY MR. MC KAY:

117 Q. You did not see the watchman wave Mr. Miller on? A. That is right.

Q. Did you keep your eyes on the watchman--were your eyes on the watchman during this period from the time you first saw Mr.

Miller's equipment and the time Mr. Miller's equipment got stuck?

A. I was right beside the watchman and I was watching both of them, I would say.

THE COURT: He did not wave Mr. Miller on?

THE WITNESS: No, sir; not to my knowledge. I assume that the right of way was clear, as I would have gone across the same time if there had been room.

BY MR. MC KAY:

118 Q. You referred to the hump effect, Mr. Stancliff. Can you see this humping effect you testified to from across the tracks; that is to say, on each side of the tracks? A. You mean as you are approaching the railroad in travelling west?

Q. Travelling the same direction Mr. Miller was, as you approached the crossing, can you see this humping effect? A. No, sir.

* * * * *

120 MR. BERNSTEIN: First, I would like to offer in evidence a part of the defendant's statement in the pretrial order.

THE COURT: The pretrial order does not have to be offered in evidence.

MR. BERNSTEIN: I would like to read it to the jury.

THE COURT: The pretrial order is a substitute for the pleadings. Just what do you want to do?

MR. BERNSTEIN: I want to read the second sentence of the fourth paragraph of the pretrial order.

THE COURT: You may do so.

MR. BERNSTEIN: May I explain to the jury what this is?

THE COURT: You may make no explanations. You may read the order made by the Court at the pretrial hearing; that is, the particular portion of the order which you have just indicated.

121 MR. BERNSTEIN: This part of the document reads:

"Defendant admits that its watchman waved the plaintiff to drive through the crossing."

If the Court please, it has been stipulated between counsel that the two trains in question--the one that first crossed and the striking train, were both scheduled trains of the Pennsylvania Railroad which were approximately on schedule at the time.

THE COURT: They were both scheduled passenger trains?

MR. MC KAY: Yes.

MR. BERNSTEIN: Which were approximately on schedule.

MR. MC KAY: Yes.

Counsel for all parties have agreed to stipulate as to the measurement and weights of the C-47 earth scraper.

MR. BERNSTEIN: You are offering those in at this time?

MR. MC KAY: I should like to read them in the record.

The wheelbase of the earth scraper was 16 feet 4 inches.

The overall height was 7 feet 10 inches.

The overall width was 10 feet 1 inch; and the overall length was 27 feet 3 inches.

The shipping weight of the earth scraper was 18,000 pounds.

* * * * *

122 MR. BERNSTEIN: I request to offer in evidence, from the third page of the defendant's pretrial statement the third complete sentence.

* * * * *

123 MR. BERNSTEIN: I am reading a statement from the pretrial

statement of the defendant:

"The train was travelling at a speed of about 70 miles an hour when it struck the equipment."

* * * * *

WILLIAM B. BROWN

was called as a witness by and on behalf of the Plaintiff,

* * * * *

DIRECT EXAMINATION

* * * * *

BY MR. BERNSTEIN:

124 Q. What is your occupation? A. Truck driver.

Q. In the course of your experience, have you had occasion to drive on the Lanham Station Road across the Pennsylvania Railroad tracks that bisect that road? A. I have.

Q. Have you, for example, been over those tracks on that road recently? A. I have.

Q. How recently? A. I was over it two weeks ago.

Q. Did you have occasion some years prior to that to be over the tracks where they had an accident at that point? A. I did.

MR. MC KAY: I am going to object to this.

* * * * *

BY MR. BERNSTEIN:

127 Q. Mr. Miller, in 1939, were you driving equipment which was a lowboy somewhat of this nature that you see in this picture? A. Yes, sir, it was a lowboy but it didn't have the same kind of equipment on it.

Q. But it was a low boy carrying some equipment? A. Yes.

Q. In 1939. Don't say anything that happened. Did you see the Lanham crossing in 1939, the railroad crossing at Lanham Station Road? A. I seen it.

Q. You have seen it recently, in the last few weeks? A. That is right.

Q. Did that crossing in its general appearance, in the contour and grade of the crossing appear to be different at the two occasions,

substantially different, or the same, or what? A. The same.

Q. Did you have occasion actually to cross the crossing in 1939?

A. I did.

128 Q. Were you at that time hauling this lowboy with equipment on it? A. I did.

Q. What, if anything, occurred at that time?

MR. MC KAY: I object to that question.

THE COURT: On what ground?

MR. MC KAY: This is too remote; this instance is too remote in time.

* * * * *

129 THE WITNESS: At that time, quarter after 7 in the morning, there was a watchman at the railroad crossing. He had a stop-and-go sign. He turned the sign on "Go". So I come across the track. I got on the north side of it, and I hung up. Raised my tractor off the ground. We had to unload the machinery and I got the machinery off. At that time the train come along and struck the back of the lowboy.

* * * * *

MR. BERNSTEIN: I am showing you, Mr. Witness, Plaintiff's Exhibits 6, 7, 8 and 9, and ask you whether on any of those photo-
130 graphs you can point out the approximate place at which your lowboy got hung up when you attempted to cross on the occasion you mentioned.

A. I can.

BY MR. BERNSTEIN:

Q. If you will, will you put a circle or X in ink at that point on the photograph?

MR. BERNSTEIN: The witness has put an X on Plaintiff's Exhibit No. 7.

* * * * *

BY MR. BERNSTEIN:

Q. You have an X here. Would you describe exactly what the X denotes? What part of your rig. A. That would be the trailer.

Q. What I am getting at--front, back or what is it? A. Middle

part.

* * * * *

CROSS EXAMINATION

BY MR. MC KAY:

131 Q. Was there a bulldozer loaded on your lowboy? A. No. It was a shovel.

Q. Steam shovel? A. Yes.

Q. How heavy was that? A. Around 22 tons.

Q. Was that all that was loaded on the lowboy? A. That is all.

Q. How low was the lowboy off the ground? A. About 2 foot.

Q. Were you hauling it with a tractor of some kind? A. Tractor with pulley trailer.

MR. MC KAY: I have no further questions, except I move to strike the evidence on the ground of the dissimilarity of the equipment.

132 THE COURT: That goes to the probative value. I am going to let the evidence stand and I will deny the motion.

* * * * *

MR. BERNSTEIN: I am offering in evidence certain rules from a book entitled "The Pennsylvania Railroad Book of Rules", published by the Pennsylvania Railroad itself, and effective as of the time of this accident.

THE COURT: Any objection?

MR. MC KAY: I don't know the specific rules he has in mind.

THE COURT: There is no question about these being the regulations in effect at the time?

MR. MC KAY: No, sir.

THE COURT: Very well, you may do so.

133 MR. BERNSTEIN: First, if the Court please, I am reading from Flyleaf No. 5, which is entitled "General Notice", which heads all of the rules, page 5.

It is entitled "General Notice", and the first part reads:

"Safety is of first importance in the discharge of duty."

I now offer in evidence General Rule A, which appears on page 7,

reading:

"Employees whose duties are prescribed by these rules must provide themselves with a copy. Employees whose duties are in any way affected by the timetable must have a copy of the current timetable with them while on duty."

This is Rule 33, on page 23 of the rule book, reading:

"Watchman stationed at public crossings at grade must use stop signals when necessary to stop trains. They will use prescribed signals to stop highway traffic."

I now offer Rule 7 on page 16 of the rule book, which reads:

"Employees whose duties may require them to give signals must provide themselves with the proper appliances and keep them in good order and ready for immediate use."

* * * * *

134 MR. BERNSTEIN: I offer in evidence Section 38 of Article 89(b) of the Code of Maryland.

THE COURT: You do not have to offer statutes in evidence because the Court will take judicial notice of the statutes.

You may call the Court's attention to a particular statute.

MR. BERNSTEIN: I ask the Court's permission to read that to the jury.

THE COURT: Oh, no. You do not read law to the jury. However, you might call it to the Court's attention and I would like to see it.

Very well. The Court will take judicial notice of that.

MR. BERNSTEIN: If the court please, I would like to offer in evidence a single sheet, which has been marked for identification Plaintiff's Exhibit No. 26.

THE COURT: What is it?

MR. MC KAY: I object. May we approach the bench?

THE COURT: Will you state your objection?

135 MR. MC KAY: I object on the ground there is no probative value there.

THE COURT: Will counsel come to the bench.

(Bench Conference:)

THE COURT: This is a list of grade crossing accidents at other grade crossings, with one exception.

MR. BERNSTEIN: Two exceptions. This is a list of accidents over the period of time indicated in the entire Pennsylvania Division.

THE COURT: How is that relevant?

MR. BERNSTEIN: Because there, in the entire division, out of possibly 20 accidents listed, there were two at this crossing, which shows the nature of the danger of the crossing.

THE COURT: I am going to exclude that.

While I don't believe in grade crossings, it is not negligence to have grade crossings.

MR. BERNSTEIN: I think there is evidence, if, out of hundreds of grade crossings they have in this division, if there are two listed at this very crossing, it shows it must be extraordinarily dangerous, this crossing.

THE COURT: I am going to exclude that. Here is a list of grade crossings beginning January 1949 and ending in 1955 showing that 136 this division of the railroad has had 25 grade crossing accidents and two of them were at this grade crossing.

Objection sustained.

MR. BERNSTEIN: May I make a further proffer to show what the exhibit will show?

THE COURT: What do you mean?

MR. BERNSTEIN: I would produce a witness from the railroad itself in support of this exhibit to show that there are hundreds of grade crossings within the division which this exhibit covers.

THE COURT: I am sustaining the objection.

MR. MC KAY: Could I clarify just a bit. This is not all grade crossings. This is grade crossings of one particular class.

THE COURT: One particular division?

MR. MC KAY: And one particular class of that division.

THE COURT: Those that have no crossing gates and part-time

watchman?

MR. MC KAY: That is right.

THE COURT: Objection sustained.

You can have it marked for identification.

* * * * *

138

HOWARD PRICE HODGES

was called as a witness by and on behalf of the Plaintiff,

* * * * *

DIRECT EXAMINATION

* * * * *

BY MR. BERNSTEIN:

Q. And your employment? A. Engineman for the Pennsylvania Railroad.

* * * * *

139 Q. You were the engineman who was involved in a collision on January 25, 1955, at the Lanham Station Road crossing? A. Yes, sir.

Q. Mr. Hodges, in a train such as the type you were operating that day, what distance, on dry track, with the weather prevailing, conditions existing on that day--

THE COURT: Is there any dispute on the weather conditions?

MR. BERNSTEIN: No.

BY MR. BERNSTEIN:

Q. What distance would it take to stop the train in an emergency if it were going 80 miles an hour before you tried to stop it? A. You say what distance?

Q. Yes.

THE COURT: At what speed?

BY MR. BERNSTEIN:

Q. 80 miles per hour.

In other words, at 80 miles per hour you throw it in emergency the very equipment you were operating that day and weather conditions that day, how many feet would it take to stop that train? A. I think

it would take about 3,000 feet. That is just about an estimate.

Q. Is it possible it could be stopped in 2500 hundred feet?

A. It might be possible.

140 THE COURT: What was your answer?

THE WITNESS: It might be possible. I couldn't say definitely.

* * * * *

ROBERT CHARLES THOMASON

was called as a witness by and on behalf of the Plaintiff,

* * * * *

DIRECT EXAMINATION

* * * * *

BY MR. BERNSTEIN:

141 Q. Where are you employed? A. Pennsylvania Railroad.

Q. How long have you been employed by the Pennsylvania Railroad? A. Approximately four and one-half years.

Q. On January 25, 1955, you were, were you not, the watchman at the crossing of the Lanham Station Road and the railroad. A. I was.

Q. That was the day this accident occurred between the train and some construction machinery that got stalled on the track? A. Yes.

Q. I take it, Mr. Thomason, that when you report to work as a watchman at a particular crossing, when you report to work on any given day, the first thing you do is check all your equipment; isn't that right? A. I do.

Q. To be sure it is all there and all in working order; isn't that correct? A. I do.

Q. On January 25, 1955, when you reported to work at the Lanham Station Road crossing did you first check all of your equipment to be sure it was all there and in working order? A. I did.

142 Q. What did that equipment consist of? A. A stop sign; a red flag; a red lantern; a white lantern; fuzees and torpedoes.

Q. You mentioned fuzees. Will you describe to the jury what a fuzee is?

THE COURT: Are fuzees involved in this case?

MR. BERNSTEIN: They are.

THE COURT: How are they involved?

MR. BERNSTEIN: Do you want me to state in the presence of the jury?

THE COURT: Yes.

MR. BERNSTEIN: This witness refused to use fuzees.

THE COURT: Aren't they used only at night?

MR. BERNSTEIN: The contention of the defendant was maybe the train couldn't see. The fuzee is the clearest warning there is.

THE COURT: Is it conceded that fuzees are used in the daytime?

MR. MC KAY: I don't know. I would have to check with my people.

THE COURT: Proceed.

* * * * *

143 THE COURT: What is a fuzee?

THE WITNESS: A fuzee is a round flare about 6 inches long that when ignited it gives off a glare.

BY MR. BERNSTEIN:

Q. Gives off a tremendous red glare, doesn't it? A. Yes. It is red.

Q. Gives off a very clear warning or danger signal when it is set off? A. It is to indicate danger.

Q. It takes only a few moments to set off; isn't that correct? A. Yes, sir, it takes a short time.

Q. The whole purpose of having those fuzees, among other things, in a watchman's shack, is that it is dangerous to set it off?

144 MR. MC KAY: I object to leading the witness.

THE COURT: Yes. In view of the fact he is an employee of the defendant, if he fails to answer properly a general question you might follow it with a leading question. Do not start with leading questions.

BY MR. BERNSTEIN:

Q. Will you state what the purpose of having the fuzee in the

watchman's shack is? A. My interpretation of the purpose of the fuzee is in case it is dark or at night, to use the fuzee for a warning.

Q. Even in daylight wouldn't the use of a fuzee be very effective to give notice of danger or warning to a train? A. It is possible.

Q. Isn't it not only possible, but isn't that most likely? A. I don't know.

Q. It is a lot more effective at some distance than a red flag would be? A. I don't know.

Q. Have you ever tried them? A. I never had a chance to try them.

Q. Didn't you have a chance to try it on January 25, 1955?
A. I had my red flag in my hand at the time and I didn't have time to get a fuzee.

145 Q. Isn't it a fact that on January 25, 1955, when this construction equipment got stuck on the track you forgot you had fuzees in that shed to use, didn't you? A. No.

Q. Why didn't you use them on that occasion? A. I had the red flag in my hand and it was still daylight.

Q. Did you wave the red flag at the train? A. I did.

* * * * *

Q. Is it your testimony that you don't know whether more or less effective than a red flag? A. In the daytime I don't know.

Q. Have you ever been instructed on that? A. No.

146 Q. But you did have fuzees in the shack on January 25, 1955?

THE COURT: Please do not go over the same ground twice. He enumerated all the equipment he had in the shack and he listed the fuzees as one of them.

BY MR. BERNSTEIN:

Q. Did you testify as follows under deposition, when your testimony was taken on January 18, 1956 -- page 18:

"Q. Did you have any way of signaling the train at the time the buzzer went off to warn the train that there might be a collision at the Lanham crossing?" "A. No."

Did you testify on January 18, 1956 --

THE COURT: What is the page, please?

MR. BERNSTEIN: Page 18.

BY MR. BERNSTEIN:

Q. Did you so testify? A. I didn't understand your question.

Q. You remember your testimony being taken under oath in an office in January, 1956; you remember that? A. Yes.

Q. Did you testify on that day as follows.

Q. Did you have any way of signaling the train at the time
147 the buzzer went off to warn the train that there might be a collision at the Lanham crossing?"

And you answered, "No."

Was that question put to you and did you so answer in January 1956? A. No, I didn't say that.

Q. You didn't say that? A. No.

Q. Are you challenging the correctness of the reporting of the transcript?

THE COURT: What was your question?

MR. BERNSTEIN: Strike the question.

BY MR. BERNSTEIN:

Q. Was there a court reporter present taking your testimony that day? A. You mean the same day?

THE COURT: Don't ask him that. He may not know what a court reporter is.

BY MR. BERNSTEIN:

Q. Was there a man writing down what you were saying the day you were testifying?

MR. MC KAY: In all fairness I think he should read the complete answer of the witness. At the bottom of page 18, the witness does explain his answer.

148 THE COURT: I think you can do that, if you wish. Each counsel has a right just to read what he pleases. You can supplement

it.

MR. BERNSTEIN: The question pending is.

Was there a man writing down what you were saying that day you were testifying.

THE COURT: The Court will take judicial notice of that.

BY MR. BERNSTEIN:

Q. At that same time did you further testify as follows, and this is purportedly you speaking; bottom of page 18, running over to 19:

"The only thing--after the buzzer goes off, the only thing that you can do is get a flag if it's in the daytime and try to get the engineer to see you to stop."

Do you remember saying that the day your testimony was taken?

A. I don't recall--

THE COURT: I do not see that contradicts anything he said on the witness stand. The only purpose for which a witness may be confronted with prior statements is if his prior statement is inconsistent with anything he said on the witness stand.

MR. BERNSTEIN: The statement here is "the only thing you can do is get a red flag", but he had fuzees.

THE COURT: His opinion was the only thing he could do was get
149 a red flag.

BY MR. BERNSTEIN:

Q. Have you ever seen fuzees on railroads to give warning of danger? A. Have I ever?

THE COURT: How long would it have taken you to run up a distance of the track and place a fuzee? Does it take any time?

THE WITNESS: Yes, sir.

THE COURT: How long?

THE WITNESS: Approximately two minutes.

BY MR. BERNSTEIN:

Q. How long would it have taken you to take a fuzee out of the shack and plant it on the track next to the truck?

THE COURT: A fuzee does not light up until the train passes

over it.

MR. BERNSTEIN: Oh, no. That is a torpedo. A fuze is lit by the man who puts it out.

BY MR. BERNSTEIN:

Q. How long would it have taken you to have gone in the shed and taken a fuze out and lit it right at the plant? A. I don't know.

Q. It wouldn't have taken you more than 15 seconds? A. I don't know.

150 Q. You could have done it in five seconds? A. I don't know.

* * * * *

Q. The fact is that you were never trained by the Pennsylvania Railroad on just how to use these fuzes and how quickly to light them and when to use them?

MR. MC KAY: I object.

THE COURT: Objection sustained. This is a leading question and argumentative question.

MR. BERNSTEIN: I will restate the question.

BY MR. BERNSTEIN:

Q. Were you ever, Mr. Witness, trained by the Pennsylvania Railroad in how to use these fuzes, how long it takes to light them and under what circumstances to use them? A. I was qualified as a watchman.

151 Q. Were you ever trained by the Pennsylvania Railroad in how to use these fuzes? A. I was qualified as a watchman; that is all I know.

THE COURT: He has answered the question.

BY MR. BERNSTEIN:

Q. When you were qualified, were you trained in the use of fuzes? A. I could read the direction of the fuze and understand how to ignite it.

Q. Did anyone ever read the directions to you and explain them? A. Yes. They have been read.

Q. When you were qualified as a watchman? A. Sure.

Q. From those can you tell how long it takes to light one?

A. No.

THE COURT: I think we are wasting too much time on this.

MR. BERNSTEIN: No further questions at this time.

* * * * *

MR. BERNSTEIN: I will read the last rule of the railroad if I may. I offer in evidence and ask permission to read to the jury certain other rules of the Pennsylvania Railroad from the same book to which I
152 have previously adverted.

THE COURT: You can't read them until you offer them in evidence.

MR. BERNSTEIN: I offer in evidence Rule 35, which appears on page 24, which reads as follows:

"The following signals will be used by flagmen:

"Day signals"--

MR. MC KAY: I object. Mr. Thomason is not a flagman.

THE COURT: A flagman is a member of the train crew.

MR. BERNSTEIN: The rule indicates when fuzees can be used.

THE COURT: Let me see that rule.

I shall sustain the objection because this rule affects flagmen and not watchmen.

MR. BERNSTEIN: I offer the rule again, for another purpose. I offer the rule for the purpose of showing from the railroad's own practice when fuzees can be used.

THE COURT: I think I will admit it for that purpose solely.

MR. BERNSTEIN: I will read the part reading, "Day Signal" only:

"Day Signal: A red flag, torpedoes and fuzees.

"Night Signals: A red light, torpedo and fuzees."

I also offer in evidence Rule 11, which is contained on page 17,
153 at the top, reading:

"A train finding a fuzee burning red on or near its track must stop and extinguish the fuzee and then proceed at reduced speed."

I offer in evidence Rule 400-N-23, which appears on page 98 and following of the rule book, reading:

"Crossing Watchman: Crossing watchmen report to and receive their instructions from the Division Engineer unless otherwise provided."

THE COURT: Suppose you come to the lectern.

MR. BERNSTEIN: "They must obey the instructions of the supervisor, track, and foreman, track. They must not absent themselves from duty until relieved. They must provide themselves with proper appliances and keep them in good order and ready for immediate use. The signal appliances for each watchman will be a standard stop sign, a red lamp approved as standard for the purpose, a red flag, a white lamp, fuzees, a whistle, standard gate lamps for crossing gates where used. They must be on lookout at all times for movements in either direction on the tracks across the highway and must not depend upon the schedules of trains nor upon warning appliances for warning of the approach of trains.

"While on duty they must not sleep or assume an attitude of
154 sleep or inattention nor must they read anything except as required in line of duty.

"They must not engage in unnecessary conversation."

THE COURT: There is no violation of this rule claimed. Please put in evidence rules that are applicable.

MR. BERNSTEIN: It is all part of the same rule.

THE COURT: You may read only those portions which are applicable.

MR. BERNSTEIN: "At crossing not protected by gates. They must station themselves in the middle of the highway near the track before each movement is made on a track across the highway and remain there until it is safe for vehicles and pedestrians to cross the track. While so stationed, they must display by day a stop sign in upright position with the flat side visible to persons approaching on the highway.

"Where there are two or more tracks when practicable they

will take a position near the track opposite from the one on which the movement is being made"--

THE COURT: I am going to strike this out, Mr. Bernstein, because it is not relevant to this case.

You don't claim any violation.

MR. BERNSTEIN: It is the latter clause. It is all one sentence.

155 THE COURT: Read only the one you claim applicable.

MR. BERNSTEIN: It is all one sentence. I can't divide it.

"-- where they can best protect the public from trains and engines approaching on other tracks. When it is safe for vehicles or pedestrians to cross the track crossing watchmen will so indicate by saying, 'All right' and beckon to cross. They shall be responsible to see that proper permission is secured to protect the movement of heavy machinery, implements or buildings across tracks at highway crossings."

THE COURT: They shall be responsible for what?

MR. BERNSTEIN: "They shall be responsible to see that proper permission is secured to protect the movement of heavy machinery, implements or buildings across tracks at highway crossings. When the crossing is obstructed or unsafe for train movements they must use a red flag by day, a red light by night and when day signals can not plainly be seen and when necessary, in addition, display lighted fuzes to stop movements on the track obstructed or unsafe."

* * * * *

156 MR. MC KAY: May it please the Court, at this time I should like to make a motion for a directed verdict on behalf of the defendant as against both the plaintiff Miller and intervening plaintiff on the ground that the plaintiff has failed to make out any case which shows that the defendant Pennsylvania Railroad was negligent.

THE COURT: I will be glad to hear from you Mr. Bernstein, as to what evidence you claim there is to show negligence on the part of the defendant.

MR. BERNSTEIN: May I say first that the defendant has waived

his right to make a motion for a directed verdict by virtue of having already offered evidence which has been admitted in the case.

THE COURT: That is not the rule.

MR. BERNSTEIN: Apart from that--

THE COURT: I have ruled time and time again that under the present procedure it is proper for the defendant to offer exhibits in connection with cross-examination of a witness. The trial of a lawsuit is not a game of chess, and it is not a series of moves. We try to do substantial justice. When we fail to do it the judicial process fails to accomplish its mission.

157 I am going to entertain the motion.

MR. BERNSTEIN: On the merits, let me take each group.

First, as to the maintenance of the grade crossing, the evidence thus far of the plaintiff himself, of the witness Stancliff and of Mr. Brown--

THE COURT: Instead of summarizing the evidence it would be much more helpful to me if you state the negligence.

MR. BERNSTEIN: One, having a humped crossing, which might be dangerous to a vehicle such as this, with the watchman beckoning, waving the vehicle to come on across the tracks, where the watchman's duty was to watch for such heavy equipment and determine whether it could safely cross.

Number 2, with the watchman telling the heavy vehicle to come across the tracks, where, the testimony shows, were schedule trains approximately on schedule, the rules require him to be familiar with that; where the trains were only one and one-half minutes apart.

Here this truck had to come one hundred feet of grade and get over in a minute and a half.

Number 3, with respect to the watchman's failure to use adequate warning measures, which, even assuming, arguendo, where there might have been some negligence on the part of the plaintiff, which

158 I don't agree, warning measures which would have stopped the train by the use of fuzees.

Next, active negligence: There is testimony in the record that the approximate distance of the straightaway before it rounds the curves is between three-quarters of a mile and a mile. The train engineer has testified that he could break down in 3,000 feet; and perhaps 25 feet. Of course, a land mile is 5,280 feet. So, the distance to where the train would have its vision obscured by the curve is between three-quarters and a mile. It would be somewhere between 3800 and 5200-and-some-odd-feet to that point. So if adequate signal had been given, if the train crew had been watching the train could have stopped.

The testimony is visibility was good. This equipment was big and bulky, obviously stationary.

THE COURT: I am not following you.

MR. BERNSTEIN: The train could have been stopped if either one of two things had occurred: If the watchman had given proper signal or the trainmen could have kept their eyes open. They could have seen big, bulky equipment on the tracks and stopped the train.

On either one of those grounds, whether it be the negligence of having the hump and the watchman motioning, saying it is safe to cross, and beckoning when there are trains a minute and a half apart, whether it be the watchman's failure to put on adequate warning devices or the failure of the train crew to see under good visible conditions -- I might add, under the statute it was their duty to maintain the crossing, under the Maryland Code.

THE COURT: What bearing--

MR. BERNSTEIN: The grade was humped; and an ordinary vehicle got its exhaust pipe scraped on the crossing, which shows it was too humped.

MR. MC KAY: There is no indication how fast Mr. Stancliff was going.

THE COURT: I am going to direct a verdict for the defendant.

* * * * *

160 MR. BERNSTEIN: May I say this is the primary negligence.

This watchman--the regulations speak of using fuzees to warn trains.

THE COURT: Yes, I know. I don't see how he would have had time to place a fuzee.

MR. BERNSTEIN: He says "ready for immediate use."

THE COURT: Surely; it is ready for immediate use. It takes time to put it down and light it.

He ran up the track with a red flag.

MR. BERNSTEIN: He says a fuzee can be seen from a great distance. A fuzee puts up a tremendous red flare.

Secondly, there is the ability of the train crew; the primary thing, that the watchman beckons this train.

THE COURT: I think I get your point. I am going to direct a verdict.

MR. GOLDMAN: I let Mr. Bernstein argue for me. I wanted to make a point after you announced--I want to say the books are replete with cases that state, and the facts show in those cases that where the train has a lookout for X number of feet and the object was obviously on the track at that time and the train could have been stopped at Y number of feet then if it is not stopped, that is evidence of negligence.

161 THE COURT: Why didn't you say that before? Do not do that again.

MR. GOLDMAN: I am very sorry.

THE COURT: I am going to direct a verdict.

(Open Court:)

DIRECTED VERDICT

THE COURT: The Court is of the opinion that while this was a very tragic and unfortunate accident for the plaintiff, there has been no showing and no evidence from which the jury would have a right to make any finding that there was any negligence on the part of the railroad company or its employees which caused the accident.

Now, there are several acts of negligence claimed here:

First, that the watchman waved the plaintiff to go through, and

of course I am construing the evidence at this stage of the case from the standpoint most favorable to the plaintiff.

The Court is of the opinion that there was no negligence in the watchman so doing. The evidence shows that if the engine of the plaintiff's apparatus did not get stalled on the track, the apparatus would have cleared the tracks before the train approached the intersection; because Miller testified that he was on the track 40 or 50

162 seconds after the apparatus was stalled and before he heard the buzzer announcing that the train was approaching and even then there was an interval between the buzzer and the actual approach of the train.

Now, there is no proof that the intersection was improperly constructed. It was not constructed on a plumb line but very few streets or highways or intersections are on a perfect level. The approach was downhill and there was a slight hump going over the intersection, not sufficient to indicate anything wrong in the construction of the intersection.

Moreover, the evidence shows that vehicles cross that intersection time and time again without any detrimental effects. That appears from the testimony of the witness Stancliff, who was called as a witness for the plaintiff.

Then, it is also urged that the watchman should have used a fuzee instead of running up the track with a red flag. The watchman was acting in an emergency. He may have had to make a quick decision. He chose to run up the track waving a red flag rather than take the time to pull out a fuzee, place it on the track and light it.

The Court does not believe that it is possible or proper to find that the judgment used by the watchman in this respect was evidence of negligence. In fact, the judgment might have been sound. In any event, the watchman had a choice under the circumstances and it could not be said his choice was negligence.

163 Finally, it is argued that when the train engineer saw the apparatus at the intersection he should have brought the train to a stop. But the engineer had a right to assume that the apparatus was moving

across the intersection and would have cleared the intersection before he reached the intersection.

To be sure, the watchman at the last minute ran up the track with a red flag. Then it would have been too late to have stopped the train. Trains have a right to be operated at a rapid speed. Otherwise, modern railroading would be impossible.

In this connection the Court refers to the cases of McDonald v. Pennsylvania Railroad Company, 210 Fed. 2d. 524, and Woodington vs. Pennsylvania Railroad, 236 Fed. 2d. 760.

The first of these cases was decided in the Third Circuit, and the second in the Second Circuit.

They involved somewhat similar considerations. As I say, while the plaintiff's serious loss naturally had adverse effects on his business and he is entitled to a great deal of sympathy; however, when it comes to determining whether a railroad company should be held liable for damages, we must not let our sympathies stand in the way of a correct determination.

The Court, in conclusion, is of the opinion that no negligence on the part of the railroad company has been shown and, for that reason, will direct a verdict in favor of the defendant.

164 THE CLERK: Will the 12 regular jurors please rise?

Members of the jury, your verdict in this case is for the defendant by the direction of the Court and that is your verdict, so say you, each and all?

(Jury answers in affirmative.)

2

[Filed August 21, 1957]

Washington, D. C.

June 20, 1957

PROCEEDINGS

THE CLERK: Miller v. Pennsylvania Railroad Company.

MR. BERNSTEIN: If the Court please, because the Court in this case directed a verdict, as I understood it, by reason of the Court's conclusion that there was no proof of negligence--

* * * * *

3

The plaintiff himself on the stand specifically testified that there was, and I believe I am using his language correctly, a sharp drop-off.

THE COURT: There is no question about the fact that there was evidence, first, that there was a sharp slope going down to the crossing and also in between the tracks there was a slight rise.

Those facts are clear in the Court's mind. The Court held, however, that there was no proof indicating that that was a defect.

MR. BERNSTEIN: The proof showed that these were legally licensed vehicles in the State of Maryland. The proof also showed that they were of standard manufacture. Combining those two elements with the fact that there was testimony of a sharp drop-off, with the fact that the vehicle did become hung up, from that the jury was clearly in a position to infer that the crossing was not adequate to accommodate legally licensed vehicles in the State of Maryland, and not being so adequate, the railroad had not discharged both the statutory and common law duty. I can not say more about the crossing.

4

I think there are more vital elements in the case. I think that alone was conclusive for purposes of jury consideration, as to whether there was adequate -- I would like to dwell on the warning the watchman gave.

If my recollection is correct, and I do not have a transcript, if my recollection is correct, Your Honor made a remark that after all, the watchman was acting in an emergency, so his selection of method in stopping the train, though --

THE COURT: Personally I thought it was of the best, because by the time he would have gotten his fuzee lit, the train would have been on top of him.

MR. BERNSTEIN: That is the precise point. Your Honor did not understand what a fuzee was.

THE COURT: I have seen fuzees lots of times. Fuzees are not used for emergency. They are generally placed when a train stops. We have all seen a flagman back of a stopped train putting a fuzee --

MR. BERNSTEIN: May I beg to differ with Your Honor. This is critical and I think, if I may take a minute, the rule of the railroad itself, and I think this is quite vital, and this is from page 100 from the book of rules. The entire rule was read in but I will only read the particular part that ends up this way:

5 "When necessary, in addition, place lighted fuzees to stop movements when the tracks are obstructed or unsafe."

In other words, when necessary. Incidentally, it says --

THE COURT: There is no question about that.

MR. BERNSTEIN: The testimony shows, the watchman's own testimony shows that in the shack he had both the flag and the fuzee. To have gotten the flag, he would have to run in the shack and get it. To get the fuzee he would have to run in the shack. The time involved would have been identical. To have made the flag effective --

THE COURT: I am not going to review that. You argued that point at the trial. I have decided. I do not hear the same argument.

MR. BERNSTEIN: What I am getting at is that he testified that the fuzee gave a bigger red glare, which obviously can be seen at a far greater distance than a flag. He is like a lifeguard. By the railroad's own rules he is made like a lifeguard.

THE COURT: I considered that at the trial. I am not going to consider it now.

* * * * *

6 MR. BERNSTEIN: I am going to argue an independent point I have not urged before. The plaintiff's own testimony was to the effect that both from the watchman's demeanor, his lack of composure and what he did he thought the watchman had lost his head.

THE COURT: He was panic-stricken. The testimony shows that. The Court had that in mind.

* * * * *

MR. BERNSTEIN: I will come now to the train crew.

I think the Court will probably agree that the testimony showed that the train could be stopped in 2,000 to 2500 feet, if my recollection
7 serves me, and that the distance --

THE COURT: Approximately a half mile.

MR. BERNSTEIN: That is right. And the straightaway distance was something like a three-quarter -of-a-mile to one mile. Also the testimony of all the witnesses of the plaintiff was that the train could be seen perfectly clearly, visibility conditions were excellent.

That left a question for the jury whether the train crew itself at the reverse end --

THE COURT: You mean you submit.

MR. BERNSTEIN: I submit that left a question for the jury as to whether the train crew could see as well in reverse as the people --

THE COURT: I think the evidence was clear that this crossing could have been seen a half mile away or more than a half a mile away, and if the engineer half a mile away started to slow down the train he could have stopped before he reached the crossing and avoided the collision.

But what motivated the Court was not that. He had a right to assume when a half mile away he saw this cavalcade, so to speak, these vehicles, that they would clear the intersection. He had no reason for assuming that they were stalled.

* * * * *

9 MR. BERNSTEIN: I submit in this case, that on the evidence in this case the jury could have concluded that the engineer saw the truck; number 2, he saw it was stalled; and 3, in the exercise of diligence, should have slowed or stopped until it became clear off the crossing.

If the testimony of the engineer were that he saw the truck and saw it moving, it is conceivable we might have had a situation for the record --

THE COURT: The burden of proof was on you.

MR. BERNSTEIN: The burden of proof -- we showed it was stopped and--

THE COURT: Very well.

MR. BERNSTEIN: In my memorandum --

THE COURT: I read your memorandum.

MR. BERNSTEIN: --I cited the case which involved the very problem where the Court held in those circumstances the engineer should slow down until he can assure himself that the vehicle will clear.

10 THE COURT: If he did that, no train could run on time.

MR. BERNSTEIN: If we didn't do it there would be a lot of deaths. The train does not have an absolute right of way. Other vehicles have rights of way and we are not in the days when in order to advance the interest of the railroad we have to protect their free movement.

They must stop when they see vehicles that are in trouble. An automobile would have to stop if it saw a pedestrian walking across the street.

* * * * *

MR. GOLDMAN: Yes. The Maryland Code provision under our charge, defective crossing, the Code provision states that the tracks of such railroad should be so constructed as to give absolutely safe and easy approach to and crossing thereof. In my memorandum on page 3 I have set that out.

* * * * *

11 THE COURT: Suppose you confine yourself to the last point.

MR. MC KAY: There was no evidence from which I believe reasonable men could have concluded that the crossing was not absolutely safe. The only evidence which the plaintiffs attempted to introduce and did introduce was related to the fact that this particularly enormous vehicle did get hung up on the crossing and that in 1939 another enormous vehicle carrying a steam shovel weighing 44,000 pounds also hung up on a crossing.

THE COURT: Your point is, what is safe for an ordinary vehicle?

MR. MC KAY: Yes.

THE COURT: I am going to deny the motion. I have gone over this matter very carefully and I see no reason for changing my conclusion.

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14, 094

United States Court of Appeals
For the
District of Columbia Circuit

FILED OCT 7 1957

WILFRED L. MILLER, et al.,

Frederic W. Stewart

CLERK

Appellants,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES C. MCKAY
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Attorneys for Appellee

October 7, 1957

NO. 14,094

QUESTIONS PRESENTED

Although there was an overpass nearby, appellant Miller attempted to negotiate a railroad grade crossing with an overlong and overweight tractor-trailer in which he was carrying heavy earth-moving equipment without the necessary permit required by law. The bottom of the lowboy trailer scraped on the ground, while on the crossing, and could not be dislodged before appellee's train collided with it.

As viewed by appellee, the questions are whether the trial court was correct in directing a verdict for appellee against both appellants, on the ground that there was no evidence from which the jury could find appellee was negligent, or whether the trial court was correct in directing a verdict for appellee against appellant Miller, on the ground that Miller's own negligence was, as a matter of law, the proximate cause of the accident.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,094

WILFRED L. MILLER, et al.,

Appellants,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
A CORPORATION,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Brief For Appellee

COUNTERSTATEMENT OF THE CASE

This action was brought to recover damages for injuries to
plaintiffs' ^{1/} excavation equipment, resulting from a grade crossing collision
between this equipment and a passenger train of defendant. Defendant

^{1/} Plaintiff Miller was conditional vendee, and plaintiff Alban Tractor
Co. was conditional vendor, of one of the pieces of equipment.

counterclaimed for damages to its locomotive, cars, electrical equipment and other property. At the trial, upon conclusion of plaintiffs' case in chief, the court directed a verdict for defendant on the ground that no evidence had been introduced from which the jury could find any negligence on the part of defendant which caused the accident. Since defendant did not put in its case, the following statement of facts is based on the testimony of plaintiffs' witnesses and certain stipulations entered into by the parties.

Plaintiff Miller, a grading and excavating contractor, testified that on January 25, 1955, at about 4:30 P. M., he and one of his employees, William Lindsey, undertook to move a bulldozer and an earth scraper from the Ardmore section of Maryland to Carroll Knolls in Silver Spring, Maryland, (J. A. 19, 22, 23). The equipment they were moving consisted of (1) a White tractor, weighing 8800 pounds, which pulled the other equipment (J. A. 20, 33); (2) a low-bed, heavy equipment trailer (called a lowboy), attached to the tractor, which weighed about 10,000 pounds and had a ground clearance of 14 inches (J. A. 20, 38; Defendant's Ex. 1); (3) a bulldozer, carried on the low-bed trailer, which weighed, together with blade and cable control, 31,847 pounds (J. A. 20, 33); (4) an earth scraper, 7 feet, 10 inches tall, weighing 18,000 pounds, which was attached to the bulldozer by a huge tongue of steel (J. A. 20, 58). Miller testified the overall length of the equipment was 67 or 68 feet (J. A. 32), and Lindsey testified the over-all length was about 70 feet (J. A. 48). Addition of the weights of the individual pieces of equipment shows the total weight was 68,647 pounds. Miller stated that because of its size this rig could not be backed up (J. A. 44).

Miller testified he did not have a permit, required by Maryland law, ^{2/} authorizing him to make this trip with this oversize equipment. The only permit he had, covered a five-mile radius of Four Corners, Maryland, whereas the Lanham grade crossing, where the accident occurred, was about eight or ten miles from Four Corners (J. A. 35). If a permit had been obtained, in addition to specifying the route to be followed and the time during which the trip could be made, the permit would have stated that railroad tracks could not be crossed at grade "until after due and sufficient notice of such proposed crossing shall have been given . . . to the track supervisor or other authorized agent of the railroad . . . and proper arrangements made for such crossing" (J. A. 37; Defendant's Exhibit 5). The permit which Miller did have contained this requirement.

With Miller driving the tractor and Lindsey following in a pick-up truck (J. A. 23), they headed for Route 50 by driving down Whitfield Road and turning onto Lanham Station Road. Turning onto Lanham Station Road necessitated crossing the railroad tracks at grade, whereas if he had continued on Whitfield Road, Miller would have used an overpass to cross the tracks. Miller stated he chose Lanham Station Road because he did not want to make the turn at Whitfield Road and Route 50, but he conceded that, in fact, he had never before turned onto Route 50 from either road with this equipment and was not familiar with either turn. Miller also stated the Lanham Station

^{2/} Ann. Code of Md., Art. 66-1/2, §80(r)(s) (1957 Cum. Supp.), requires oversize and overweight motor vehicles to have permits to use the highways of the state; the permit will specify the route to be followed, the hour and date on which passage is to be effected and the maximum size and weight of the vehicle.

Road route, necessitating crossing the tracks at grade, was about one-half mile shorter than the route via the overpass. In addition, Miller testified it was possible to go from Ardmore to Silver Spring by way of the George N. Palmer Highway and that this route did not entail crossing any railroad tracks at grade; this was a longer route but Miller had used it before (J.A. 23, 39, 42).

When Miller reached the top of a hill about 150 to 200 feet from the tracks, he stopped while a train passed. It was then about 5:15. Miller testified that prior to the passage of the train, the crossing watchman had been standing on the crossing holding his stop sign aloft; after the train passed the watchman took his sign down and motioned for Miller to come down the hill. Miller proceeded onto the crossing and the tractor went across safely, going 18 to 20 feet beyond the tracks. The bottom of the trailer, however, became lodged on the bed of the road. Miller testified there "seemed to be a slight incline or hump in the road there" and the bottom of the trailer scraped on the roadbed and the trailer stopped (J.A. 24-26).

Miller immediately applied full power to the engine of the tractor to try to free the unit. After doing this two or three times without success, he got out and instructed Lindsey to unload the bulldozer from the trailer. As Lindsey was starting the bulldozer's engine, in order to back it off the trailer, Miller heard a buzzer in the watchman's shed; this buzzer went off about 40 to 50 seconds from the time the trailer got hung up. The watchman thereupon grabbed a red flag and started to run up the left side of the railroad track. Miller stated he did not know what the buzzer meant but "anticipated

that a train was coming, " so he got up on the trailer with Lindsey and they started waving their hands, staying there until the train got so close they had to jump down to safety just before the train collided with the equipment (J. A. 26-29).

Miller testified he estimated that when first seen the train was approximately three-quarters of a mile to a mile away (J. A. 30, 42). Lindsey testified he and Miller first saw the train when it was at the Route 50 underpass and that five to ten seconds elapsed between the time they first caught sight of the train and the time they jumped from the equipment (J. A. 51). Plaintiffs' witness, Stancliff, who observed the events from the time Miller stopped at the top of the hill until the collision, testified that when first seen the train was at the whistle sign, between the crossing and the overpass (J. A. 55-56).

STATUTES INVOLVED

The relevant statutes are set forth in the Appendix.

SUMMARY OF ARGUMENT

Appellants introduced no evidence from which appellee could be found negligent. The evidence not only failed to show any defect in the grade crossing but, on the contrary, established that this crossing was in safe condition for the passage of normal vehicular traffic, which is all that is required.

Nor was appellee's watchman negligent either in permitting Miller to enter the crossing or in his efforts to stop the approaching train. The watchman's duty is to give notice of the approach of trains, and he cannot be expected to leave his post at the tracks, ignore traffic approaching from the other direction and cease watching for trains in order to examine vehicles and decide whether they are in condition to cross the tracks safely. He performs his duty when he warns travelers that trains are approaching, and the evidence shows that Miller was given ample time to negotiate this crossing. The watchman also acted reasonably in attempting to warn the oncoming train by running up the track waving a red flag. The railroad's rules specify the red flag as the proper daytime warning device, and no evidence was introduced to support appellants' claim that a fuzee would have been a practical or a preferable warning signal in the circumstances.

Appellants' final contention, that the train crew was negligent in failing to stop before hitting the equipment, is not supported by any evidence. On the contrary, appellants' own evidence shows beyond doubt that the engineer could not possibly have stopped the train in time to avoid the accident. The trial court, therefore, properly directed a verdict for appellee against the appellants on the ground that there was no evidence from which a jury could find appellee was negligent.

The action of the trial court in directing a verdict against appellant Miller was also correct for the reason that the uncontradicted evidence demonstrates Miller was negligent as a matter of law. Miller was negligent in failing to obtain the Special Hauling Permit required for the transportation of

this oversize equipment. If he had obtained the permit, it would either have specified a route which avoided the grade crossing, or the route would have included the grade crossing with a proviso that prior arrangements must be made with the railroad before crossing the tracks at grade.

Aside from his failure to obtain the required permit, Miller was negligent in crossing the railroad tracks at grade when two other routes were available which, although less convenient, were safer. He was also negligent in failing to make prior arrangements with the railroad to use the grade crossing, for even if a permit were not required for this trip, common sense and his awareness of the fact that such arrangements were necessary when crossing with a permit, should have caused Miller to follow this procedure. Finally, Miller was negligent simply for attempting to negotiate this grade crossing with this excessively long, low and heavy equipment.

ARGUMENT

Appellee will show that, contrary to appellants' contentions, the trial court did construe the evidence most favorably to appellants and had no alternative but to direct a verdict for appellee in light of the total absence of proof of negligence on its part. It will also be shown that as against appellant Miller the judgment of the trial court is correct on the ground that the accident was the result of Miller's own negligence.

I. THERE IS NO EVIDENCE THAT APPELLEE WAS NEGLIGENT

A. Appellee Was Not Negligent in the Maintenance of the Grade Crossing

The trial court ruled

"Now, there is no proof that the intersection was improperly constructed. It was not constructed on a plumb line but very few streets or highways or intersections are on a perfect level. The approach was downhill and there was a slight hump going over the intersection, not sufficient to indicate anything wrong in the construction of the intersection.

"Moreover, the evidence shows that vehicles cross that intersection time and time again without any detrimental effects. That appears from the testimony of the witness Stancliff, who was called as a witness for the plaintiff." (J. A. 77).

The uncontradicted testimony fully supports the trial court's conclusion. Miller testified there "seemed to be a slight incline or hump in the road" at the crossing (J. A. 26) and plaintiffs' witness Stancliff described the crossing as follows:

"The approach to the railroad is coming downhill. . . . as you actually go on to the railroad, the first set of rails will slightly go uphill and then the second set of rails will go up a little further. The third set of rails will go up even further, at which time, after you get over the crossing it drops right off downhill again."

Stancliff said you would get a sort of over-all hump effect if you have a long enough vehicle (J. A. 55).

Thus, the evidence as introduced by plaintiffs' witnesses is that there is a slight incline or hump effect if you have a long enough vehicle. That this hump effect is indeed slight is corroborated by (1) the photographs, Plaintiffs' Exhibits 6, 7, 8, 9, 19, which disclose no unusual humping but only a normal incline of the road following the natural characteristics of the terrain; (2) Miller's testimony that he did not remember noticing a hump there when he crossed the grade in his automobile "a couple of years" ago; and

(3) Miller's testimony that from his seat in the tractor, a height equivalent to the top of the roof of an ordinary automobile, he did not see any hump (J.A 22, 26, 40-41).^{3/}

To support their claim that this slight incline or over-all hump effect constituted a defect, appellants rely upon the following factors: (1) When Miller attempted to negotiate this crossing with excavating equipment which was about 70 feet long, weighed 68,647 pounds and was built extremely low to the ground, the lowboy trailer, which had a ground clearance of 14 inches and which was carrying a bulldozer weighing about 32,000 pounds, dragged on the ground and stopped; (2) In 1939, sixteen years before this accident, a lowboy trailer of undetermined age and condition, carrying a steam shovel weighing 44,000 pounds, became hung up at this crossing (J.A. 59-61); (3) Stancliff testified that about four years ago, while driving over this crossing in a 1939 Plymouth, which was then 14 years old, the muffler of the car "dragged at a point on the crossing" (J.A. 54).

This is the only evidence plaintiffs could produce to show a defect in the crossing -- that during all the years the crossing had been in use, the muffler on a 14-year old car dragged on the ground and two very long, low and heavily laden low-bed trailers got hung up. There is no evidence that any other vehicle or any normal or ordinary vehicle ever got hung up on the crossing. On the contrary, plaintiffs' own witness, Stancliff, testified that in connection with his business, which had been located on Route 50 in Lanham

^{3/} Miller testified that "Due to the height I was sitting in the truck I did not see any hump." However, it is obvious that a hump of the nature described would be most clearly visible from a height.

for eight years, he crossed these railroad tracks at the Lanham Station crossing "on an average of six or eight times a day" (J.A. 51-52). Appellee submits that when a man has used a grade crossing six or eight times a day for eight years and the only mishap he ever had was to drag the muffler on a 14-year old car, which was in an undetermined condition and traveling at an undetermined speed, it is impossible to reach a conclusion other than that the crossing was in good condition for use by normal, ordinary vehicles. This conclusion is strengthened by the fact that when Miller drove his equipment onto this crossing, the tractor-truck went over without any difficulty, going 18 to 20 feet beyond the tracks, and it was only the very low, heavily laden lowboy trailer which dragged on the ground (J.A. 26).

Thus, the evidence is clear that this crossing was in good and safe condition for the passage of ordinary vehicles, and this is all the law requires it to be. A railroad must exercise only reasonable care in maintaining public crossings and in no event is the railroad an insurer of the safety of those using a crossing,^{4/} nor is a foolproof, absolutely safe crossing required.^{5/} The appellee's duty to exercise reasonable care in maintaining its crossing necessitates keeping the crossing in a condition which will be reasonably safe in normal circumstances for the ordinary traffic which can be reasonably

^{4/} Gable v. Kriege, 221 Iowa 852, 267 N.W. 86, 90 (1936); Louisville & N. R.R. v. Jackson's Adm'r, 243 Ky. 59, 47 S.W. 2d 941, 943 (1932); Wallace v. Louisiana & A. Ry., 6 So. 2d 63, 66 (La. 1941); Hickey v. Kansas City Southern Ry., 290 S.W. 2d 58, 61 (Mo. 1956); Bentz v. Louisville & N. R.R., 183 Miss. 563, 184 So. 448, 449 (1938); Humphrey v. Virginian R.R., 132 W. Va. 250, 54 S.E. 2d 204, 211 (1949).

^{5/} Peterson v. Chicago, M & St. P. Ry, 185 Iowa 378, 170 N.W. 452 (1919); Dantone v. Standard Mach. Co., 195 So. 39, 40 (La. 1940).

anticipated. Since public roads are intended for ordinary travel, those in charge of them have performed their duty if the roads meet the requirements which their ordinary and usual use demands, and a railroad is not answerable for extraordinary accidents. Medema v. Hines, 273 Fed. 52, 54 (8th Cir. 1921); Gable v. Kriege, 221 Iowa 852, 267 N.W. 86, 90 (1936).

Thus, in Homeland Ins. Co. v. Thompson, 12 So. 2d 62 (La. 1943), the plaintiff was conveying a heavy dragline unit loaded on a lowboy trailer; the truck weighed 7,000 pounds, the trailer and dragline weighed 26,000 pounds, and the over-all length of the unit was 45 feet. The unit became stalled or stuck on the track and was hit by a train. The court ruled it is not a railroad's duty to keep a crossing safe and easy in all circumstances, but rather the duty is to permit safe and convenient passage by persons using reasonable care. The truck and dragline unit was very heavy, of unusual length, and the trailer had a low clearance, thus "presenting an unusual type of vehicular traffic and an unusual situation for such a grade crossing." Since the crossing was in reasonably safe condition as an ordinary grade crossing and was safe for the usual type of traffic on that road, it was held there was no negligence in the maintenance of the crossing.

^{6/}
In another case the blade of a road grader on which plaintiff was riding caught on the rail at a crossing and plaintiff fell off; negligence of the railroad was alleged in that there was a hole between the rails into which the grader sank, causing the blade to catch on the rail. The court ruled that in

^{6/} Missouri Pac. R.R. v. Hare, 194 Ark. 441, 108 S.W. 2d 577 (1937).

constructing and maintaining highway crossings, railroads are not required to anticipate and provide against extraordinary dangers and are not required to provide facilities for the passage of vehicles other than those in common use in the locality. Travelers ". . . have no right to demand extraordinary facilities to meet the necessities of the special use. If a traveler attempts to cross with some kind of a vehicle not in common use, he must take the crossing as he finds it constructed for use of ordinary vehicles." (108 S.W. 2d at 578).

St. Louis and S. F. R.R. v. Dyer, 87 Ark. 531, 113 S.W. 49 (1908), concerned the overturning of a traction engine while it was passing over a grade crossing. The crossing was alleged to be defective because planks were missing from between the rails. The court ruled it was error to refuse an instruction that "if the crossing was in such condition that an ordinary vehicle in passing upon the highway could cross in perfect safety, then the company was not negligent in maintaining the crossing in such condition." The court went on to say

"Railroads in constructing and maintaining highway crossings are not required to anticipate and provide against extraordinary dangers, and are not required to provide facilities for the passing over of vehicles other than those in common use in the locality. Travelers along the highway, when they encounter railroad crossings, are entitled to facilities which are reasonably safe and convenient for vehicles in common use; but, when they attempt to use crossings for other purposes, they have no right to demand extraordinary facilities to meet the necessities of the special use. If a traveler attempts to cross with some kind of a vehicle not in common

use, he must take the crossing as he finds it constructed for use of ordinary vehicles." (113 S. W. at 50.) 7/

Not only have appellants failed to prove this crossing was defective, but, on the contrary, appellants' evidence demonstrates that this crossing was perfectly safe for ordinary vehicles and that in the course of at least 16 years the only vehicles which experienced difficulty were two extraordinarily long, low and heavily weighted tractor-trailer units. Certainly appellee was under no duty to anticipate passage of such vehicles over this grade crossing in light of their extraordinary size, the fact that the tracks could be crossed by means of a railroad overpass nearby and the fact that state law allows such vehicles to be transported only after a permit is secured, specifying a route known to be safe for such vehicles and specifically requiring that due notice be given the track supervisor and prior arrangements be made, if it is necessary that they cross railroad tracks at grade (J. A. 37).

7/ Other cases have held that a railroad is not expected to maintain its crossing in safe condition for the passage of vehicles "of any kind or character", since such a standard of care might be too great a burden (Kansas City, M. & O. Ry. of Texas v. Guinn, 146 S.W. 959 (Tex. 1912)); that it is the duty of a railroad to construct its trestle so as to afford clearance for ordinary vehicular traffic, but the railroad is not bound to anticipate that injury would result to those using vehicles of an unusual or extraordinary type (Krause v. Southern Pac. Co., 135 Or. 310, 295 Pac. 966, 968 (1931)); and that what is a reasonably safe condition for a crossing must be determined in the light of the conditions of public travel to which the highways are subject (Alabama Power Co. v. McGehee, 228 Ala. 505, 154 So. 105, 107 (1934)).

It cannot be doubted that appellee maintained this crossing in a safe condition, free from defects, as required by law, and the trial judge properly ruled there was no evidence of negligence.^{8/}

**B. Appellee's Watchman Was Not
Negligent.**

The trial court correctly ruled that the watchman was not negligent either in permitting Miller to enter the crossing or in his efforts to warn the approaching train.

Appellants' argument on the first point misconstrues the purpose of a crossing watchman by assuming that when a watchman permits a vehicle to enter the crossing, he decides the vehicle can negotiate the crossing without mishap. The watchman is put at a crossing to watch for the approach of trains and to prevent persons from going on the tracks when a train is approaching.^{9/} The Maryland statute, providing for watchmen at crossings, makes

^{8/} The cases cited in this section of appellants' brief require no discussion. The following information may, however, be helpful to the Court. In *Contino v. Baltimore & Annapolis R.R.*, 178 F.2d 521 (4th Cir. 1949), p. 11 of appellants' brief, the court specifically noted that, since 1904, Maryland law had required such overpasses to have a clearance of 14 feet.

During their discussion of *Baltimore & Ohio R.R. v. Postom*, 85 U.S. App. D.C. 207, 177 F.2d 53 (1949), p. 14 of appellants' brief, appellants treat the case as if there were no evidence of a defective crossing, stating that the alleged presence of loose gravel was rebutted by photographs. The fact is the majority opinion specifically states the photographs seem to indicate the crossing was not in good condition, containing several deep ruts and marked depressions, some filled with loose stones. The court concluded it was difficult to see how the jury could have reached any conclusion other than that the railroad was negligent in the manner in which it maintained the crossing.

^{9/} Cf. *Gillies v. New York Cent. R.R.*, 116 N.E. 2d 555, 558 (Ind. 1954) where the court stated the primary purpose of watchmen is to warn persons that a train is approaching.

clear that the sole function of the watchman is to give notice of the approach of trains. The statute provides that if the designated officials decide a grade crossing is dangerous, the railroad shall

"....either place a flagman at said crossing, whose duty it shall be to give timely notice to all persons using said crossing, of the approach of all locomotives or trains, or a system of electric alarm bells, to give such notice at the approach of trains, or shall erect safety-gates at said crossing. . . ." (Ann. Code of Md., Art. 23, §219.)

Thus, a system of electric alarm bells to give notice of the approach of trains is an acceptable substitute for a watchman and the conclusion inevitably follows that the watchman's only duty is to perform the same function as an alarm bell. Accordingly, the rules of the Pennsylvania Railroad governing crossing watchmen are concerned with their duty to watch for approaching trains and warn travelers thereof.^{10/}

It is the contention of appellants, however, that the watchman should carefully examine equipment and ascertain its length, weight, height and ground clearance before permitting it to enter the crossing. Such a requirement would obviously be inconsistent with the watchman's duty to watch for approaching trains and to regulate the passage of vehicles across

^{10/} The rules provide that at a crossing not protected by gates, crossing watchmen must "station themselves in the middle of the highway near the track before each movement is made on a track across the highway and remain there until it is safe for vehicles and pedestrians to cross the track. While so stationed, they must display by day a stop sign in upright position with the flat side visible to persons approaching on the highway.

"Where there are two or more tracks when practicable they will take a position near the track opposite the one on which the movement is being made where they can best protect the public from trains and engines approaching on other tracks. When it is safe for vehicles or pedestrians to cross the track crossing watchmen will so indicate by saying, 'all right' and beckon to cross." (J.A. 72-73).

the tracks. Thus, in the instant case a train was just passing as Miller stopped at the top of the hill 150 to 200 feet from the track. The watchman was guarding the tracks, holding his stop sign aloft. After the train passed, Miller wanted to cross from one side and Stancliff from the other. This was a busy time of day, 5:15 in the afternoon, and the watchman could not reasonably be expected to leave his post at the tracks, ignore traffic approaching from the other direction, and cease watching for approaching trains in order to examine Miller's vehicle and make a decision as to whether it was too long, too heavy or too low to cross the tracks.

The watchman was stationed at the tracks to protect all travelers, not just Miller, and it was incumbent upon the watchman to keep a constant lookout for approaching trains and to be ready to warn travelers approaching on both sides of the tracks. He could not neglect this primary responsibility in order to examine Miller's vehicle and decide whether it could negotiate the crossing in safety. No doubt one of the purposes of the permit regulation with respect to grade crossings is to render unnecessary the making of just such determinations by crossing watchmen.

Appellants next contend the watchman did not allow Miller sufficient time in which to negotiate the crossing. The evidence clearly demonstrates, however, that Miller had ample time within which to make the crossing and that he failed to get across, not because of inadequate time, but because his extraordinarily long, low and heavy equipment got hung up.

Miller testified that 40 or 50 seconds elapsed between the time the equipment got hung up and the time the buzzer went off, warning of the

train's approach. This was ample time for Miller to have cleared the remaining portion of the crossing, since even at a speed of three miles an hour he could cover 176 feet in 40 seconds.^{11/} Moreover, more than 40 or 50 seconds was available, since a certain period of time elapses after the warning buzzer sounds and before the train arrives.

Appellants argue, however, that the watchman was supposed to be familiar with the railroad schedule and should not have permitted Miller to enter the crossing at a time when a train was about due. This is clearly an untenable position which, if adopted, would mean that if a scheduled train is about due, traffic would be held up until the train arrived, even though the train might be behind schedule. Furthermore, a train schedule is not a reliable guide as to when crossings are safe, because trains are sometimes ahead of schedule and special trains are sometimes sent forward on the track. Therefore, as a practical matter, a railroad schedule can only be an approximation of the time when trains will arrive, and since any number of things can happen to delay a train, a watchman cannot be expected to hold

^{11/} What could be accomplished between the time the equipment got hung up and the time the warning buzzer sounded is indicated by Miller's testimony that when the equipment stalled he applied the full power to the engine of the tractor to try and free the unit, and after doing this two or three times without success, he got out and instructed Lindsey to unload the bulldozer. It was while Lindsey was attempting to start the bulldozer's engine that the buzzer sounded (J.A. 27-28). Similarly, between the time Stancliff saw the trailer settle down on the tracks and the approach of the train, he had time to back up his own truck, turn around and drive 100 feet from the crossing, get out and start walking back towards the crossing (J.A. 53).

up traffic whenever a scheduled train is due.^{12/} Recognizing this fact, the rules of the Pennsylvania Railroad specifically provide that watchmen "must be on lookout at all times for movements in either direction on the tracks across the highway and must not depend upon the schedules of trains nor upon warning appliances for warning of the approach of trains" (J. A. 72).^{13/}

For these reasons the watchman was not expected to rely on a time schedule in determining when vehicles may safely be permitted to cross tracks. Since the warning buzzer had not yet gone off and no train was yet in sight when Miller began to cross the tracks, the watchman was acting with all due care in permitting passage at that time.^{14/}

Appellants' final contention is that the watchman was negligent in attempting to warn the approaching train by running up the track towards the train, waving a red flag, rather than by lighting a fuzee. Miller testified

^{12/} 44 Am. Jur., Railroads, §560; cf. *Lemke v. Chicago, R.I. & P.R.R.*, 195 F.2d 989, 991 (8th Cir. 1952); *Guidry v. Texas & N. O. R.R.*, 56 So. 2d 611 (La. 1952).

^{13/} Cf. *Negretti v. Baltimore & O. R.R.*, 179 Md. 30, 16 A. 2d 902, 904 (1940) ("a train on a known railroad crossing should be expected").

^{14/} Cf. *Seaboard Air Line R.R. v. Crowder*, 191 Va. 635, 62 S.E. 2d 227 (1950), where a car stalled on a railroad track and was hit by a train traveling at a speed of 80 m.p.h. Noting that at that speed about 20 seconds elapsed between the warning signal and the arrival of the train, the court ruled there was sufficient time for the automobile to cross the track and the proximate cause of the accident was the stalling of the automobile and not the speed of the train.

that when the buzzer went off the watchman grabbed his red flag and ran toward the oncoming train. On the basis of this conduct, Miller characterized the watchman as "losing his head" and being "panic-stricken." This, however, was not the action of a panic-stricken man who had "lost his head" but rather the correct and immediate response of a watchman who knows a train is approaching an obstruction and realizes he must take immediate action to stop that train.

Appellants argue that the watchman should have lit a fuze rather than run up the tracks waving a red flag. However, the rules of the railroad specifically provide that when a crossing is obstructed or unsafe for train movements watchmen must use a red flag by day, and a red light by night or when day signals cannot be seen (J.A. 73). This rule establishes the red flag as the principal warning signal in the daytime and a red light as the principal signal at night. This was the understanding of the watchman, who testified the purpose of the fuze was to be a warning in case it was dark or nighttime and he used the red flag because it was daylight (J.A. 67). Miller had testified that when he approached the crossing visibility was good and he believed the sun was still out (J.A. 24). Therefore, it is clear that day signals could be seen and the red flag was the proper signal to be used.

In addition to the fact that the watchman acted in accord with the railroad's rules, there is no evidence from which it could be found that a fuze would have been a better signal. Appellants put in no evidence of the value of a fuze as a warning device during the daytime, nor did they

show whether a fuze is ever used in these circumstances, although appellants put the train engineer on the stand and could have questioned him on this point, since he would certainly be the best person to discuss the relative value of fuzes and red flags as warning devices in the daytime. Furthermore, there is no evidence as to how long it takes to light a fuze and how far up the track a fuze must be placed in order to give timely warning. When asked whether it took "only a few moments" to set off a fuze, the watchman replied, "Yes, sir, it takes a short time" (J.A. 66). However, there was not that much time before the train arrived. Lindsey testified that only 5 to 10 seconds elapsed between the time they saw the train and the time they jumped from the equipment. There is no testimony as to how much time elapsed between the sounding of the buzzer and the sighting of the train, but even allowing another 5 to 10 seconds, there was not available even the few moments required for the watchman merely to light the fuze, and there certainly was not enough time to run to the shed and get the fuze, light it and place it far enough ahead on the track for the train to see it in time.

Thus, it is clear the watchman not only acted reasonably in the emergency situation with which he was confronted, but, in fact, followed the best possible course of action.^{15/}

^{15/} Appellants also refer in this part of their brief to the railroad rule that watchmen shall be responsible to see that proper permission is secured to protect the movement of heavy machinery, implements or buildings across tracks at highway crossings (J.A. 73). Appellants contend the watchman did not obey this rule. No evidence was introduced as to the precise meaning of the rule, so we do not know what constitutes heavy machinery, etc., from whom permission is to be secured and whether the rule contemplates the making of special arrangements for passage of the specified items. If, as appellants seem to indicate, the rule is referring to the Maryland permit requirement, then appellants are, of course, simply conceding their own negligence in not obtaining the required permission.

C. The Train Crew Was Not Negligent.

Appellants' final argument is that the train crew was negligent in failing to stop the train before hitting the equipment. This argument is based on the assumptions that the train crew saw, or should have seen, the equipment on the tracks and realized, or should have realized, that the rig was not moving and that said perception and realization did take place, or should have taken place, in time to stop the train. However, there is absolutely no evidence on which to base any of these assumptions. Appellants did not put in any evidence as to visibility conditions from the train, when the train crew first saw, or in the exercise of reasonable care should have seen, the equipment, or when the train crew realized, or should have realized, the equipment was not moving off the track. Although the engineer was called to the stand by appellants, he was not questioned about any of these things.^{16/} Evidence of this nature is, of course, essential to appellants' case. E.g., Baltimore & O. R.R. v. Leasure, 193 Md. 523, 69A.2d 248 (1949); Northern Cent. Ry. v. McMahon, 97 Md. 483, 55 Atl. 627 (1903).

In the cases relied on by appellants the plaintiffs made cases for the jury by putting in evidence of this nature. Thus, in Union Pacific R. R. v. Ward, 230 F.2d 287 (10th Cir. 1956), the engineer testified he saw the

^{16/} Appellants' argument seems to assume the mere happening of the accident shows appellee was negligent. However, as this Court stated in Martin v. United States, 96 U.S. App. D.C. 294, 297, 225 F.2d 945, 948 (1955), "the burden of proving defendant's negligence is upon the plaintiff. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant."

truck, which he hit, when it was 2,000 feet away. In Fitzgerald v. Boston and Maine R.R., 328 Mass. 297, 103 N.E. 2d 245 (1952), the engineer testified he saw a man waving a warning when the train was 400 feet from the crossing but he did not slow down until he actually saw a truck on the tracks, when the train was 300 feet away. The evidence in Mo. Pac. R.R. v. Mitchell, 197 Ark. 400, 122 S.W. 2d 544 (1938), showed the engineer was watching the automobile before it went on the tracks, and he saw the automobile on the crossing with people trying to shove it off, but he simply blew his whistle to get them off the track and did not reduce the speed of the train.

Appellants cite a statement from Canadian Pacific Ry. v. Sullivan, 126 F. 2d 433 (1st Cir. 1942), to the effect that if a train could not have been stopped in the distance between the curve and the crossing the jury could conclude either that the train was being operated at an excessive speed or that its brakes were defective, and in either event the railroad would be negligent. The import of the court's statement is that if a train cannot be stopped within the range of the trainman's vision, the speed is excessive and constitutes negligence per se. However, the law is that, absent legislation, no rate of speed of a railroad train approaching a crossing constitutes negligence per se.^{17/} The reason for this rule is that the very purpose of railways is

^{17/} Pennsylvania R.R. v. State, 53 A.2d 562, 567 (Md. 1947); Baltimore Transit Co. v. Bramble, 175 Md. 334, 2 A.2d 416, 423 (1938); Chicago, Rock Island & Pacific R.R. v. Breeding, 232 F.2d 584, 588 (10th Cir. 1956); Carter v. Pennsylvania R. R. 172 F.2d 521, 522 (6th Cir. 1949); 44 Am. Jur., Railroads, §511.

the accomplishment of public transportation at high rates of speed, and to require that railroads generally reduce their speed at all grade crossings would defeat the public benefit to be obtained from the railroad's existence.

Thus, outside the city any speed consistent with the safety of the train and the passengers is permissible,^{18/} and a train need not reduce speed as it approaches a grade crossing,^{19/} nor must a train be run at such a speed^{20/} that it is possible to stop within the distance illuminated by the headlights^{21/} or within the operator's range of vision. The statement in Canadian Pacific Ry. v. Sullivan is, therefore, contrary to the accepted authority.

^{18/} State v. Philadelphia, B. & W. R.R., 120 Md. 65, 87 Atl. 492, 496 (1913); Guidry v. Texas & N. O. R.R., 56 So. 2d 611, 613 (La. 1952); Buchthal v. New York Cent. R.R., 334 Mich. 556, 55 N.W. 2d 92, 94 (1952) (traveling at speed in excess of 80 miles per hour not negligent); Branson v. Atchison, T. & S.F. Ry., 239 S.W. 2d 1003, 1004 (Mo. 1952) (in country away from congested areas, it is not negligent for passenger trains to run over railroad crossing at speed of 85-90 miles per hour); Ecker v. Union Pacific R.R., 83 N.W. 2d 551, 558 (Neb. 1957).

^{19/} Pennsylvania R.R. v. State, supra; Baltimore Transit Co. v. Bramble, supra; State v. Philadelphia, B & W. R.R., supra; Kansas City Southern Ry. v. Wiggins, 234 F.2d 128, 130 (5th Cir. 1956); Willett v. Baltimore & O.S. W.R.R., 284 Ill. App. 307, 1 N.E. 2d 748, 750 (1936); Modlin v. Consumers Cooperative Ass'n. 172 Kan. 428, 241 P.2d 692, 697 (1952) (railroads may lawfully operate their trains at any rate of speed their business may require outside city limits, so long as it is not dangerous for them to do so, even though the rate of speed is so great as to make it impossible for their trains to stop at crossings, and standing alone such conduct is not negligent); Bahry v. Illinois Cent. Ry. 13 So. 2d 78, 80 (La. 1943); Buchthal v. New York Cent. R.R., supra, at p. 95.

^{20/} Ledet v. Texas & N. O. R.R., 79 So. 2d 604, 607 (La. 1955).

^{21/} Woodington v. Pennsylvania R.R., 236 F.2d 760, 766 (2d Cir. 1956), cert. denied, 352 U.S. 970 (1957); Johnson v. Killion, 179 Kan. 571, 297 P.2d 177, 179 (1956); Homeland Ins. Co. v. Thompson, supra, at p. 64.

Having introduced no evidence as to what the engineer saw or should have seen, appellants simply assume he caught sight of the equipment at the same time appellants' witnesses saw the train. Not only is there no basis in the record for such an assumption, but even making this assumption, the evidence shows the engineer could not have stopped the train in time to avoid a collision. Miller testified he first saw the train when it was approximately three-quarters of a mile to a mile away (J.A. 30); he subsequently stated this was a rough estimate (J.A. 42). Lindsey testified, however, that he and Miller saw the train simultaneously when it was at the Route 50 overpass (J.A. 51). Stancliff testified the train was first seen at the whistle sign between the crossing and the overpass (J.A. 55-56).

The photographs in evidence (Plaintiffs' Exhibits 8, 9; Defendant's Exhibits 7, 8) show clearly that this overpass is much closer to the crossing than three-quarters of a mile, and it is well settled that when the testimony of a witness "is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it." Chambers v. Skelly Oil Co., 22/ 87 F.2d 853, 856 (10th Cir. 1937), citing many cases. Furthermore, there is in the record uncontradicted testimony of Lindsey which conclusively demonstrates that when first seen the train was much closer than three-quarters of a mile. As the court said in Hickey v. Missouri Pacific R.R., supra, plaintiff's claim that he "looked at a certain point and that no train was in sight,

22/ Accord, Baltimore & O. R.R. v. Muldoon, 102 F.2d 151, 152 (3d Cir. 1939) (testimony of plaintiff as to how far he could see up the track was contradicted by photographs of the tracks and was rejected); Hickey v. Missouri Pacific R.R., 8 F.2d 128, 131 (8th Cir. 1925).

will not be given credence if the mathematical facts in the testimony given in his own behalf demonstrate the unsoundness of his claim. " (Emphasis added)

The uncontradicted testimony is that the train was traveling at 85 to 90 m. p. h. (J. A. 31, 57). At 85 m. p. h. it would have taken about 42 seconds to travel one mile, and about 32 seconds to travel three-quarters of a mile. However, no such period elapsed between the time Miller and Lindsey saw the train and the time of the collision. Lindsey's testimony was uncontradicted that only five to ten seconds elapsed between the time they first saw the train and the time they jumped off the trailer, and both Miller and Lindsey testified they jumped right before the collision.

Giving appellants the benefit of every doubt, we shall take the maximum period of ten seconds between the time the train was sighted and the time Miller and Lindsey jumped off the trailer, and add another five seconds as the time elapsing between the jumping off and the collision. Again giving appellants the benefit of every doubt, we shall use the speed of 85 m. p. h. rather than 90 m. p. h. In 15 seconds a train going 85 m. p. h. will travel 1870 feet. However, appellants introduced testimony of the train engineer that, traveling at 80 m. p. h., it would have taken about 3,000 feet for the train to stop; the engineer said it might be possible to stop in 2,500 feet, although he could not definitely say so (J. A. 64-65). Since the evidence showed the train was traveling at 85 to 90 m. p. h., the question asked of the engineer should have postulated that speed, rather than 80 m. p. h. As a result, all we know is that in excess of 3,000 feet were required in which to stop this train. However, the maximum distance between the place where the train was first seen and the point of collision was not even 2,000 feet.

The only possible conclusion is that, assuming the engineer saw the equipment and undertook to stop the train at the same time Miller and Lindsey first saw the train, it was not possible to stop in the available distance. Furthermore, even if we made the unjustified assumption that the engineer saw the equipment at that time, he could not be expected to slow down immediately unless he knew the equipment was stalled. As the trial court observed, when a train crew first catches sight of a vehicle in the distance on a track, it has a right to assume the vehicle is moving,^{23/} and this is especially true when, as in this case, the vehicle seen from a distance is only moving at 3 m. p. h. It would, of course, be impossible for railroads to operate with any efficiency if the engineer must apply his brakes every time he sees a vehicle on a crossing ahead.

Thus, appellants have not only failed to present any evidence to support a finding that the train crew was negligent in failing to stop the train, but they have demonstrated by the mathematical facts in the testimony given in their own behalf that the train could not possibly have been stopped^{24/} in time to avoid the collision.

^{23/} Cf. *Irby v. Southern Ry.*, 98 S. E. 2d 349 (N. C. 1957); *Woodington v. Pennsylvania R. R.*, *supra* (the engineer, rounding a curve 800 feet from the crossing, thought at first that a crane was moving over the crossing and not that it was stuck on the track).

^{24/} Appellants also make the point in their brief that the witnesses testified they did not see any sparks flying from the train wheels or notice the train slow down before the collision. Even if it were true that the train did not slow down before the collision, this would be irrelevant in light of the evidence in this case. However, plaintiffs themselves read into the record defendant's pretrial statement that the train was traveling 70 m. p. h. at the time of the accident, a deceleration of 15 to 20 m. p. h. before the collision (J. A. 59).

D. Conclusion

The above analysis demonstrates that there is no evidence to support a finding that appellee was negligent in any respect. To have let this case go to a jury would, in the words of this Court, "permit them merely to speculate as to the liability of the defendant. This will not be permitted, since the negligence of defendant is an affirmative fact to be established by the plaintiff." Feiffer v. Mann, 64 App. D. C. 230, 231, 76 F.2d 1000, 1001, cert. denied, 296 U.S. 587 (1935). The trial court properly directed a verdict in appellee's favor because "a mere scintilla of evidence is not sufficient" and there is no evidence "upon which a jury can properly proceed to find a verdict for the party upon whom the onus of proof is imposed." Tobin v. Pennsylvania R. R., 69 App. D. C. 262, 263, 100 F.2d 435, 436 (1938), cert. denied, 306 U.S. 640 (1939).

II. APPELLANT MILLER WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW.

The evidence adduced during the presentation of appellants' case and cross-examination of appellants' witnesses, demonstrates beyond a doubt that appellant Miller was guilty of contributory negligence as a matter of law and is, therefore, barred from recovery in this action. ^{25/} This evidence

^{25/} A plaintiff is contributorily negligent as a matter of law under Maryland law if the evidence shows "some prominent and decisive negligent act" on the part of plaintiff "which directly contributed to the accident and was the ~~promi-~~mate cause thereof, and such negligent act must be of such prominent and decisive character as to leave no room for difference of opinion thereon by reasonable minds." National Hauling Contractors Co. v. Baltimore Transit Co., 185 Md. 158, 44 A.2d 450, 451 (1945); State v. Carroll-Howard Supply Co., 183 Md. 293, 37 A.2d 330, 334, (1944).

shows Miller was negligent on four distinct grounds: (1) he failed to obtain the required Special Hauling Permit; (2) he rejected safe routes in favor of the route via the grade crossing; (3) he failed to notify the proper railroad authorities of his intention to cross the tracks at grade; and (4) he attempted to cross the tracks with this equipment.

A. Failure to Obtain a Special Hauling Permit

The Maryland permit requirement is found in Ann. Code of Md., Art. 66-1/2, § 80(r)(s) (1957 Cum. Supp.), which provides:

"(r) Oversize motor vehicles. -- A fee is hereby imposed on every oversize motor vehicle using the highways of the State, the said permit to be issued by the State Roads Commission and the permit shall specify the route to be followed, and the hour and date on which the passage is to be effected and maximum size. The fee to be charged for said permit shall be \$10.00."

"(s) Overweight vehicles. -- (1) A charge is hereby imposed on the weight of all vehicles in excess of that permitted by law and every vehicle having such overweight shall secure a permit from the State Roads Commission, the charge for which shall be \$10.00.

"(2) The permit shall specify the route to be followed, the mileage covered and the date and hours between which the passage is to be made and maximum weight."

Art. 66-1/2, §§ 277, 278, fix the maximum length of a vehicle or combination of vehicles at 55 feet, and the gross weight at 65,000 pounds. The testimony disclosed that the equipment driven by Miller was between 67 and 70 feet long and its gross weight was 68,647 pounds. The rig was, therefore, both oversize and overweight, and thus subject to the permit requirement.

Appellants will probably contend a permit was not required, because Lanham Station Road was a county road and not a state road. This contention

must be rejected on two grounds. First, assuming arguendo that a permit would not have been required if the entire trip were to be conducted on county roads, Miller's proposed route did include travel on a state highway, Route 50, and the only reason he turned down Lanham Station Road was to reach Route 50. Therefore, it is clear that Miller's trip could not legally have been accomplished without a permit.

Secondly, the contention that one can travel without a permit on highways other than those designated as "State Highways" is erroneous. Section 80(s) applies to "all vehicles" and § 80(r) applies to every motor vehicle "using the highways of the State." That this phrase "highways of the State" includes all roads within the state and not only those operated by the state follows from the definition of highway in § 2(a)(57), Art. 66-1/2, which provides:

"Street or Highway: The terms 'street,' 'highway,' 'roads,' 'public highway,' or 'public roads' shall include any highway or thoroughfare of any kind used by the public" (Emphasis added).

On the other hand, when it is intended to designate only those highways operated and maintained by the state, the statutes use the phrase "State highway system." E.g. Art. 66-1/2, § 151A (1957 Cum. Supp.); Art. 89B, § 2.^{26/}

^{26/} Article 89B, § 2 defines "State Highway System" as "that system of roads which are from time to time owned by the State and which the State Roads Commission by resolution from time to time designates as State roads to be maintained and operated by the Commission."

Thus, the "highways of the State" referred to in § 80(r) include all highways and thoroughfares of any kind used by the public within the borders of the state.^{27/} Any other interpretation would, of course, mean that while § 80(s), dealing with overweight, applied to all vehicles, § 80(r), dealing with oversize, would apply only to those vehicles using the State Highway System. No reason appears for making such a distinction.

This conclusion is reinforced by § § 1 and 151 of Art. 66-1/2 Ann. Code of Md. Section 1 provides:

"The provisions of this Article are intended to be State-wide in their effect, and except to the extent that they may be specifically authorized by other provisions of this Article . . . no City, County or other Municipal sub-division of the State shall have the right to make or enforce any local law, ordinance or regulation upon any subject for which provision is made in this Article

"The provisions of this Article (except as herein otherwise specifically provided) are intended to be exclusive of all local and municipal legislation or regulations, upon the various subjects with which this Article purports to deal. . . ."

Sections 151 and 151A (1957 Cum. Supp.) state that the provisions of Art. 66-1/2

^{27/} The trial court ruled it would "construe that highways of the state means highways within the state and not highways belonging to the state." (J.A. 35).

Plaintiffs argued in the trial court that the statement, on the particular permit put in evidence, that "this permit does not cover over any roads not maintained by the Maryland State Roads Commission," indicates a permit is not required on county roads. The statement referred to is typed on the permit in the section which designates the route to be taken by the permittee. This particular permit was a blanket permit for one month, and it authorized travel only over the "Maryland State Highway System" within a designated 5-mile area. The obvious purpose of the statement was simply to make clear that this prescribed route did not include county or municipal roads, and the statement has no bearing on the general scope of the Maryland permit requirement.

shall not be deemed to prevent local authorities from promulgating traffic regulations with respect to standing or parking of vehicles, designation of one-way streets, speed and weight of vehicles in public parks, traffic control devices, stop signs and speed of vehicles on highways not designated or maintained as part of the State or Federal highway system. Since local authorities are not authorized to regulate oversize vehicles except in public parks, the permit requirements in Art. 66-1/2 have a state-wide applicability as provided in § 1, exclusive of local control, and any local regulation of the subject would be invalid.^{28/}

If Miller had obtained a permit, as he was required to do, it would have stated the route he was to follow and the hour and date on which passage was to be effected. The route specified could only have taken one of two general courses: (1) it would have been drawn up so as to avoid the grade crossing on Lanham Station Road, in which event this accident would not have occurred; or (2) it would have included crossing the tracks at Lanham Station Road with the proviso, as stated on the permit, that the tracks could not be crossed at grade until the track supervisor or other authorized agent of the railroad was notified and proper arrangements made for such crossing,^{29/} in which event those in charge of coordinating

^{28/} Belle Isle Cab Co. v. Pruitt, 49 A.2d 537 (Md. 1946); Mayor and City Council of Havre de Grace v. Johnson, 143 Md. 601, 123 Atl. 65 (1923); 5 Am. Jur., Automobiles, § 75.

^{29/} Miller admitted he did not notify or attempt to get in touch with the track supervisor or any other agent of the appellee before making this trip (J. A. 38).

train movements would have had an opportunity to choose a time when the crossing could be blocked off and the equipment gotten across with the least danger to the equipment and the trains.

In this connection there are two recent cases of particular interest, McDonald v. Pennsylvania R.R., 210 F.2d 524 (3d Cir. 1954) and Woodington v. Pennsylvania R. R., 236 F.2d 760 (2d Cir. 1956), cert. denied, 352 U.S. 970 (1957). Both cases involved the same accident, which occurred when a six-wheel, motor-powered crane, weighing more than 24-1/2 tons, was hit by a train after it had stalled on a grade crossing. In McDonald the widow of an engineman killed in the accident sued the railroad and Groves Company, the owner of the crane, and in Woodington another engineman who was injured sued the railroad and Groves.

The grade crossing where the accident occurred was on a little-used spur road, connecting two highways. The vehicle in question was over-size and could not lawfully be moved without a permit. The Pennsylvania permit requirement was very similar to that in Maryland, prohibiting the operation on Pennsylvania highways of all oversized, overweight vehicles without a special permit.

"authorizing the applicant to operate or move . . . a vehicle . . . of a size or weight exceeding the maximum specified in this act. . . . Every such permit shall be issued for a single trip, and shall designate the route to be traversed, subject to such rules, regulations, restrictions, or conditions as shall be deemed necessary

by the authority granting such permit. . . . " (75 Pa. Stat. Ann. §.455) 30/

At the time of the accident the crane was being operated without the required permit. Furthermore, just as in our case, it was not necessary to cross the tracks at grade, since there was an underpass nearby. The operators of the crane did not take the safe route, however, because it necessitated reversing the boom on the crane, and they wished to avoid the trouble and possible damage to the vehicle that would be involved. Nor did the crane operators notify the railroad they intended to cross the tracks at grade.

In McDonald the jury returned a verdict against Groves and in favor of the Pennsylvania Railroad. On appeal the court affirmed the judgment against Groves, stating the accident occurred because Groves' employees elected to cross the tracks at a grade crossing instead of making use of a closely adjacent highroad with an underpass. "Had Groves' employees made use of the road with the underpass they would have been put to the comparatively slight trouble of reversing the boom on the crane. They preferred not to inconvenience themselves even to this small extent." The court concluded that

30/ The general conditions imposed by the Pennsylvania Department of Highways are like those in Maryland, providing that nothing in the permit shall be construed to confer authority to cross any "railroad or railway tracks, at grade, until after due and sufficient notice of such proposed crossing shall have been given * * * to the track supervisor or to the authorized agent of the railroad * * * and proper arrangements made for such crossing * * *" (Emphasis added.) 210 F.2d at 529.

"At this point the plaintiff need not have proceeded further to prove Groves' culpable negligence. The rejection of a safe overpass or underpass and the election to cross tracks at grade has been held to constitute negligence as a matter of law. See Starovetsky v. Pennsylvania Railroad Co., 1938, 328 Pa. 583, 195A. 871; Tharp v. Pennsylvania Railroad Co., 1938, 332 Pa. 233, 2 A.2d 695; and Simpkins v. Pennsylvania Railroad Co., 1939, 334 Pa. 1, 5 A.2d 103." (210 F.2d at 528)

However, plaintiff had also sought to prove that the failure to obtain a permit was negligence contributing to the accident. In considering this point, the court noted that overweight vehicles are required to obtain permits, because they may work serious damage to a road and because they are an obstacle to the free movement of traffic, thereby creating traffic hazards. "The Pennsylvania permit system is reasonably designed to keep large equipment off busy highways, narrow streets or grade crossings." The court held there was evidence from which the jury could infer that had Groves applied for a permit, the permit would not have embraced the grade crossing or that had Groves given notice to the railroad of the proposed crossing at grade the trainmen could have been informed in time to avoid the accident.

In Woodington, the jury also found against Groves and the appellate court affirmed, relying on McDonald and quoting the statement in this case that

"In the case at bar a man was killed by reason of a senseless accident caused by the indifference of the employees of a large contracting company, reflected by at least one of its officers, to the laws of Pennsylvania governing highway traffic." (236 F.2d at 764.)

The court concluded that Groves could be found negligent for failing to secure the permit, for failing to notify the railroad of its intention to cross at grade, or for choosing the grade crossing rather than the underpass.

In the instant case, if Miller had obtained the required permit he would either have been directed to follow a route other than that by way of the Lanham crossing or he would have been routed over the crossing with specific instructions to make special arrangements with authorized agents of the railroad before attempting to cross the tracks. Thus, the dangers incident to the passage of oversize equipment over grade crossings would have been obviated or substantially lessened. In this way the Maryland permit requirement was designed to prevent the very kind of accident which occurred, and the violation of the permit statute was, therefore, negligence as a matter of law. "Violation of an ordinance intended to promote safety is negligence. If by creating the hazard which the ordinance was intended to avoid it brings about the harm which the ordinance was intended to prevent, it is a legal cause of the harm." Ross v. Hartman, 31/ 78 U.S. App. D.C. 217, 218, 139 F.2d 14, 15 (1943).

31/ In this case defendant's agent violated a traffic ordinance by leaving the key in the ignition in an unlocked truck. An unknown person drove the truck away and ran over the plaintiff. The court held the violation of the ordinance was negligence which was the legal cause of the harm. "Both negligence and causation are too clear in this case, we think, for submission to a jury." Accord, Jackson v. Blue, 152 F.2d 67 (4th Cir. 1945); Atchison, T. & S.F. R.R. v. Reesman, 60 Fed. 370 (8th Cir. 1894); Restatement of Torts, § 286.

B. Rejecting Safe Routes in Favor of the Grade Crossing

The testimony is uncontradicted that rather than taking the route over the grade crossing, Miller had a choice of two routes, which would not have necessitated crossing any railroad tracks at grade. Miller testified he could travel from Ardmore to Silver Spring by means of the George N. Palmer Highway without having to cross any tracks at grade, but that this was a longer, out of the way route (J.A. 39). Miller also testified he could have avoided the Lanham grade crossing by taking Whitfield Road all the way to Route 50, but that he would have a hard time executing the turn at Whitfield Road and Route 50 (J.A. 24).^{32/} Miller admitted, however, that he had never before made the turn from either Whitfield Road or Lanham Station Road with this equipment (J.A. 39). Furthermore, Lindsey testified that one of his main duties as a flagman was to help the driver of the equipment execute turns by stopping cars in back of the rig, because a rig that long must start in the right hand lane to make a left hand turn and vice versa (J.A. 48-49).

It is clear Miller rejected safe routes in order to serve his own convenience, just as in Woodington and McDonald the crane operators rejected a safe route to avoid the trouble of reversing the boom on the machine.

^{32/} Miller also said there would be heavy traffic on the two safer routes. However, the fear of traffic did not deter Miller from setting out to transport this heavy equipment at 5 p.m., at the height of the rush hour, over State Highway 50. Miller's testimony on this point underscores the importance of obtaining a permit, for the permit authorities are much better qualified than Miller to determine the best roads to take and the best places to make turns with this type of equipment.

As the court stated in McDonald, the rejection of a safe route and the election to cross tracks at grade constitute negligence as a matter of law.

Thus, in Starovetsky v. Pennsylvania R.R., supra, plaintiff's husband had been found lying on railroad tracks about 200 feet from an underpass.

Holding that a jury verdict for plaintiff should have been set aside and judgment entered on a clear showing of contributory negligence, the appellate court ruled:

"If it be assumed that he left Hancock street and went up to the tracks to cross them . . . , we are at once confronted with the well settled rule of law that one is guilty of contributory negligence in rejecting a safe way . . . , and, instead, voluntarily choosing one known to be dangerous. . . .

"For many years it has been the declared public policy of the commonwealth to regulate railway and highway crossings. The Public Service Commission was vested with large powers authorizing the separation of such crossings at grade with jurisdiction to impose the cost on the railway company or the local community or both. When the grades have been separated, a traveler on foot or by vehicle may not reject, either for his own convenience or other personal reason, the safe way provided pursuant to law and elect to cross the tracks at grade without being guilty of contributory negligence." (195 Atl. at 872.) 33/

Since Miller rejected safe routes, albeit less convenient ones, in favor of a shorter but dangerous route, he is barred from recovery by his contributory negligence.

33/ The same result was reached in Tharp v. Pennsylvania R.R., supra, where plaintiff's husband was struck by a train while crossing tracks on a plank crossing frequently used by passengers and others; there was a highway bridge over the tracks at the end of the station. For additional cases supporting the well established principle that if two routes are open, one of which is hazardous because of circumstances, it is a person's duty to select the route which is not hazardous, see Birmingham Electric Co. v. Jones, 234 Ala. 590, 176 So. 203, 208 (1937); Lindloff v. Duecker, 217 Iowa 326, 251 N.W. 698, 702 (1933); James v. Thompson, 35 So. 2d 146, 149 (La. 1948); Simpkins v. Pennsylvania R.R., supra; Birthisel v. Concord Premium Building & Loan Ass'n., 343 Pa. 194, 22 A.2d 685, 686 (1941).

C. Failure to Notify Proper Authorities
of Intent to Cross Tracks at Grade

The evidence is uncontradicted that the equipment Miller was moving was overweight and overlong and that he had obtained a special hauling permit to move this same equipment within a five-mile radius of Four Corners, Maryland; this permit stated that special notice must be given to the proper railroad authorities and proper arrangements must be made before the equipment could be taken over a railroad grade crossing. Therefore, even if common sense did not warn Miller that he should make special arrangements before crossing the tracks, in the exercise of due care he should have realized that the reasons which necessitate such a procedure are equally applicable to all grade crossings, not just to those crossed under the authority of a special permit. Thus, even if Miller were not required to have a permit for this trip, he was put on notice that the only safe way to cross tracks at grade with this equipment was to notify the proper authorities and make the necessary arrangements, which admittedly he did not do (J. A. 38).

The exercise of due care required of Miller when he wished to cross the tracks at grade ^{34/} necessitated compliance with the outlined procedure, and failure to comply was negligence which, beyond doubt, directly contributed to the ensuing accident.

^{34/} It is well settled that the train has the right of way at a crossing, and travelers must exercise due care for their safety. E.g., *Pennsylvania R.R. v. Yingling*, 148 Md. 169, 129 Atl. 36 (1925); *Mitchell v. New York Cent. R.R.*, 135 N.E. 2d 423 (Ohio 1955); 44 Am. Jur., Railroads, § 529.

D. Attempting to Negotiate the Grade Crossing
With This Equipment

Leaving aside questions as to permits and alternative safe routes, it is clear Miller was negligent simply in attempting to cross the tracks with this equipment. Appellants contend the watchman was negligent in not stopping Miller from entering the crossing, but in making this argument, they must, in fact, concede that Miller was himself negligent. The evidence shows this crossing was in safe condition for ordinary traffic, and difficulty arose only when an oversized combination of vehicles attempted to cross. That is, the problem was not the crossing but the vehicle, and Miller was certainly more familiar with the proportions of the vehicle, its excessive length, its ground clearance and its weight, than was the watchman. Miller also knew this equipment could not be backed up because, as he said, "the pan would jackknife" (J.A. 44). It is illogical to suggest that a watchman, whose main concern is to make certain a train is not approaching before a traveler goes on the crossing, should, upon being confronted with an unfamiliar combination of vehicles for the first time, be expected to make a decision as to whether this rig can safely make the crossing, and at the same time to suggest that the owner and driver of the vehicle, who knew its precise measurements, was not negligent in driving it onto the crossing.

Miller admitted that he did not speak to the watchman, he had never seen this watchman before, and had no idea whether this watchman had ever seen this kind of equipment before; Miller did not ask the watchman to examine the rig nor did he tell the watchman anything about the length or weight of the equipment (J.A. 40). There is no evidence that Miller got

out to examine the crossing or made any other effort to determine whether passage could be safely accomplished. In short, Miller took no precautions and exercised no care whatsoever in entering the crossing. It is well settled that those approaching railroad crossings must realize they are in a zone of danger and must exercise care commensurate with that danger.^{35/} Even though a watchman signals a traveler to cross the tracks, the traveler is not relieved from the duty to exercise due care,^{36/} and where a traveler takes no precautions and does not exercise care for his own safety but simply relies on the watchman or railroad warning signal, he is negligent as a matter of law.^{37/}

Clearly it is negligent as a matter of law for the driver of an overlong, overweight combination of vehicles, who is thoroughly familiar with the dimensions of the rig and who is aware that state law considers this an oversize vehicle, the right to transport which is circumscribed by various

^{35/} Groesch v. Gulf, Mobile & Ohio R.R., 241 F.2d 698 (7th Cir. 1957); Buchholz v. Union Pacific R.R., 311 P.2d 717 (Colo. 1957); Ecker v. Union Pacific R.R., supra; Irby v. Southern Ry., supra.

^{36/} Filkosky v. Pennsylvania R.R., 780 Ohio App. 280, 69 N.E. 2d 660 (1946); Castle v. Director General of Railroads, 232 N.Y. 430, 134 N.E. 334 (1922); Irby v. Southern Ry., supra; Reuling v. Chicago, St. P., M. & O. Ry., 257 Wis. 485, 44 N.W. 2d 253 (1950).

^{37/} Baltimore & O. R.R. v. State, 58 A.2d 243 (Md. 1948); Baltimore & O. R.R. v. Bruchy, 161 Md. 175, 155 Atl. 346 (1931); Groesch v. Gulf, Mobile & Ohio R.R., supra; Buchholz v. Union Pacific R.R., supra; Southern Ry. v. Feldhaus, 261 S.W.2d 308 (Ky. 1953); Norfolk & W. Ry. v. Benton, 160 Va. 633, 169 S.E. 560 (1933).

conditions, to go onto a railroad grade crossing without making any effort to ^{38/} determine whether he can cross in safety.

CONCLUSION

The trial court was correct in ruling that there was no evidence to support a finding of negligence on the part of appellee and, therefore, the trial court properly directed a verdict in favor of appellee and its judgment should be affirmed by this Court. Furthermore, the uncontradicted evidence shows that appellant Miller was negligent as a matter of law, and, therefore, on this ground also the action of the trial court was correct as to appellant Miller.

Respectfully submitted,

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^{38/} See State of N. D. v. Northern Pac. Ry., 171 F.2d 506 (8th Cir. 1949) (plaintiff was negligent for failing to exercise due care in moving a 45-foot long dragline machine across tracks); Echols v. Atlanta, B. & C. R.R., 45 Ga. App. 609, 165 S.E. 484 (1932) (although there was no warning sign on bridge, plaintiff was negligent to attempt to clear the bridge); Steele v. Central of Georgia Ry., 123 Ga. 237, 51 S.E. 438 (1905) (plaintiff was negligent in attempting to clear overpass).

STATUTORY APPENDIX
ANNOTATED CODE OF MARYLAND

Article 23, Section 219

"Whenever the several railroads of this State, operated by steam, shall cross any public highway at grade outside the corporate limits of cities, and any such highway shall be believed to be of such a character as to render the passage of locomotives and trains thereon dangerous to life and property, it shall be the duty of the commissioners of the county in which such point of crossing shall be located, to notify the company owning or operating the railroad at such point, by serving a written notice on the superintendent or other agent of such railroad company in said county, that the said county commissioners will, thirty days thereafter, consider the necessity of further protection against danger at said crossing; and if, after the expiration of said thirty days said county commissioners, or a majority of them, shall determine that such protection is necessary, they shall notify said railroad company through its superintendent or ticket agent in said county, that within sixty days thereafter, said railroad company shall either place a flagman at said crossing, whose duty it shall be to give timely notice to all persons using said crossing, of the approach of all locomotives or trains, or a system of electric alarm bells, to give such notice at the approach of trains, or shall erect safety-gates at said crossing, which shall be closed not less than one-half minute before the passage and during the passage of every railroad train or locomotive across said highway; or shall change the said grade crossing so as to pass said highway with an under or over grade crossing, in which case neither a flagman nor safety-gate shall be required." [Emphasis added.]

Article 66 1/2

Section 1

"1. The provisions of this Article are intended to be State-wide in their effect, and except to the extent that they may be specifically authorized by other provisions of this Article or by Public Local Laws providing for the regulation of taxicabs and the operators thereof, heretofore or hereafter enacted, no City, County or other Municipal subdivision of the State shall have the right to make or enforce any local law, ordinance or regulation upon any subject for which provision is made in this Article, nor require any registration or licensing of motor vehicles or operators thereof in addition to the registration and licensing herein prescribed, nor impose upon the owner or operator of any motor vehicle any tax, registration fee, license fee, assessment or charge of any kind for the use of a motor vehicle upon any public highway or highways in this State.

"The provisions of this Article (except as herein otherwise specifically provided) are intended to be exclusive of all local and municipal legislation or regulations, upon the various subjects with which this Article purports to deal, and all Public Local Laws. Ordinances and Regulations inconsistent or identical therewith or equivalent thereto are hereby repealed; and the charters of all Municipal Corporations of this State are modified so as to prohibit such corporations from making or enforcing any ordinance or regulations in violation of this article.

Section 2

"2. Definitions of Words and Phrases: (a) The following words and phrases when used in this Article shall, for the purpose of this Article, have the meanings respectively ascribed to them in this section, except as hereinafter specifically provided.

* * * * *

"(57) Street or Highway: The terms 'street', 'highway', 'roads', 'public highway' or 'public roads' shall include any highway or thoroughfare of any kind used by the public whether actually dedicated to the public and accepted by the proper authorities or otherwise and the term shall include roads and driveways of State Hospitals and other State Institutions."

Section 80 (1957 Cum. Supp.)

"(r) Oversize motor vehicles. -- A fee is hereby imposed on every oversize motor vehicle using the highways of the State, the said permit to be issued by the State Roads Commission and the permit shall specify the route to be followed, and the hour and date on which the passage is to be effected and maximum size. The fee to be charged for said permit shall be \$10.00.

"(s) Overweight vehicles. --(1) A charge is hereby imposed on the weight of all vehicles in excess of that permitted by law and every vehicle having such overweight shall secure a permit from the State Roads Commission, the charge for which shall be \$10.00.

"(2) The permit shall specify the route to be followed, the mileage covered and the date and hours between which the passage is to be made and maximum weight."

Section 151

"Power of Local Authorities."

"151. (a) The provisions of this Article shall not be deemed to prevent local authorities with respect to streets and highways under their

jurisdiction and within the reasonable exercise of the police power from--

- (1) Regulating the standing or parking of vehicles;
- (2) Regulating traffic by means of peace officers or traffic control devices;
- (3) Regulating or prohibiting processions or assemblages on the highways;
- (4) Designating particular highways as one way highways and requiring that all vehicles thereon be moved in one specific direction;
- (5) Regulating the speed and weight of vehicles in public parks;
- (6) Designating any intersection as a stop intersection requiring all vehicles to stop at one or more entrances to such intersections.

"(b) No ordinance or regulation enacted under subdivisions (4), (5) or (6) of this section shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrances to the highways or part thereof affected as may be most appropriate."

Section 151A (1957 Cum. Supp.)

"151A. Powers of cities, towns and villages to regulate speed; exception as to Baltimore City.

Notwithstanding any other provision of this article the appropriate authorities of any incorporated city, town or village are authorized and empowered to regulate the speed of vehicles on any road, street, lane or alley which is within their respective corporate limits and (except in Baltimore City) which has not been designated or maintained as a part of the State or Federal highway system or an extension thereof. In Baltimore City, the power to regulate the speed of vehicles shall apply to every street, lane, alley or other public thoroughfare within the limits of the City."

Section 277 (1957 Cum. Supp.)

"277. Length of vehicles.--No vehicle or combination of vehicles including the load thereon shall exceed 55 feet in length inclusive of front and rear bumpers; . . ."

Section 278 (1957 Cum. Supp.)

"278. Weights of vehicles and loads.-- . . . (c) Gross weight of vehicle or combination of vehicles. -- The gross weight of any motor vehicle or combination of vehicles may not exceed 65,000 pounds. . . ."

Article 89BSection 2

"2. (Definitions). As used in this Article, the following words and terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:. . .

"(B) (State Highway System.) The term "State Highway System" means that system of roads which are from time to time owned by the State and which the State Roads Commission by resolution from time to time designates as State roads to be maintained and operated by the Commission. . . ."

APPELLANTS' REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

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Joseph W. Stewart

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No. 14, 094

WILFRED L. MILLER, et al.

Appellants

VS.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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APPELLANTS' REPLY BRIEF

INTRODUCTORY

This reply brief is necessary because, in its frantic effort to justify the gross judicial invasion below of the jury's function, defendant has (1) dragged in the "red herring" of contributory negligence which was not, nor could not have been, relied upon by the court below in directing a verdict at the close of plaintiffs' case in chief, and (2) manufactured a record upon which to justify the ruling below rather than having argued from the actual record facts.

I. CONTRIBUTORY NEGLIGENCE WAS NOT RELIED UPON IN THE DIRECTION BELOW; IT HAS NO RECORD BASIS; IT COULD NOT HAVE BEEN THE PROXIMATE CAUSE OF THE ACCIDENT; IN ANY EVENT, IT WOULD HAVE BEEN A JURY ISSUE. 1/

A. The fact that Miller did not have a special hauling permit from the Maryland State Roads Commission was an irrelevant, prejudicial fact introduced into evidence over plaintiffs' objection. The issuance or non-issuance of such a permit was irrelevant because the accident occurred on a county, not a state, road (J.A. 37), and a permit from the Commission was not required on a county road. The form of the permit, introduced into evidence by defendant during plaintiffs' case in chief,² stated on its face that "This permit does not cover over any roads not maintained by the Maryland State Roads Commission" (J.A. 36). And plaintiffs' counsel represented to the trial court that he had under subpoena an administrator from the Maryland State Roads Commission who, at the appropriate time on rebuttal, would testify that the accident happened on a county road, over which the Maryland State Roads Commission had no jurisdiction (J.A. 37).

Defendant's argument that even though the accident occurred on a county road, Miller was required to have a state permit because he traveled over a state road in order to reach the county road and the crossing, is clearly specious. To test defendant's theory, assume that jurisdiction X is completely surrounded by jurisdiction B, the latter requiring travelers to pay a license fee in order to pass. A motorist

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Under the law of Maryland, contributory negligence cannot be imputed to the intervening plaintiff, Alban Tractor Co. Price v. Miller, 165 Md. 578, 169 Atl. 800 (1934).

2

Offering evidence at that juncture should, absent any other reason, have foreclosed a motion for directed verdict at the close of plaintiffs' case in chief.

traveling in jurisdiction X after passing through B has an accident, and it is discovered he had failed to pay his license fee to B. Could it be said that this default was contributory negligence proximately causing the accident? To ask the question is to answer it.

That Art. 66-1/2, Sec. 80(r)(s) of the Ann. Code of Maryland applies only to state, and not county, roads is clear from the language of the statute, as well as from the language on the permit itself. Section 80(r) of the statute provides, "A fee is hereby imposed on every oversize motor vehicle using the highways of the State" (emphasis added). The statute does not say highways in the state. "Highways of the State" are logically synonymous with the State Highway System, which is defined by Article 89B of the Maryland Code (Appellee's Brief, Statutory Appendix, p. 4) as "that system of roads which are from time to time owned by the State and which the State Roads Commission by resolution from time to time designates as State Roads to be maintained and operated by the Commission."

In any event, whether or not the statutory state permit system was applicable was patently an issue that could not be resolved until all the evidence thereon was heard, including the testimony of those charged with its administration and the issuance of the permits.

B. Even assuming, arguendo, that a state permit was required for travel to or on county roads, the failure in this case to have a permit was not the proximate cause of the accident, and, therefore, could not bar recovery. Apparently the trial judge so conceived at one time in ruling that the failure to have a permit was irrelevant when he said, "But the fact that he did not have a permit would not have any proximate causal relationship to the accident" (J.A. 34). Defendant has never shown that had Miller obtained a permit, he would not have been allowed to drive across this particular crossing.

There was also no evidentiary causal relationship between the lack of permit and the accident, because even defendant contends that the only effect of the permit would have been (1) to deprive Miller of the right to use the crossing -- but this was not shown by any evidence, or (2) to have required Miller to notify the railroad of his intention to cross its tracks -- but defendant overlooks the fact that the railroad did in fact have knowledge of Miller's intention to cross the tracks. The record shows that the watchman on duty was the agent of the railroad. He saw Miller's rig approaching and waved him onto the tracks. Notice to the agent was notice to principal. Therefore, lack of notice of Miller's intention to cross the tracks cannot in any way be said to have been the proximate cause of the accident.

C. Further, again assuming, arguendo, that the Maryland State Roads Commission Regulations applied to county roads, and, in addition, assuming, arguendo, that a violation of the regulations was a proximate cause of the accident, the issue presented is still one of fact for the jury, and cannot properly be decided as a matter of law. Even in the McDonald and Woodington cases (Appellee's Brief, pp. 32-35; see also, Appellants' Brief, p. 28, fn. 17), so heavily relied upon by defendant, both judges decided that the issues of contributory negligence were for the jury, and both cases were submitted to the fact-finders for resolution.

And finally, assuming, arguendo, that the Maryland Statute was applicable, that the lack of permit was the proximate cause of the accident, and was contributory negligence as a matter of law -- there would still be a question for the jury under the doctrine of last clear chance as to whether, despite this pre-existing contributory negligence, the watchman could, and in the exercise of reasonable care, should have been able to effectively warn the train and/or the train crew could and should have stopped their train and thus have avoided the accident (see Appellants' Brief, pp. 24-28).

II. THERE WAS SUBSTANTIAL EVIDENCE OF NEGLIGENCE WHICH DEFENDANT OVERLOOKS OR DISTORTS; DEFENDANT MISCONSTRUES THE TEST OF THE SUFFICIENCY ON MOTION FOR A DIRECTED VERDICT AS PERMITTING AN ANALYSIS OF THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE MOVANT.

To demonstrate the defense error in this regard, we will, with respect to each of the three claimed acts of negligence, compare some of the defense statements of the fact (or its omission of the fact) with the actual record fact or the fair inference therefrom.

A. The Defense Versus The Record - The Negligent Construction and Maintenance of the Grade Crossing.

1. Defendant (and the trial court in its opinion) completely ignores the statutory duty of a railroad at a grade crossing to keep its own road bed and the bed of the highway in proper repair;". . . and the tracks of such railroads . . . shall be so constructed as to give absolutely safe and easy approach to and crossing thereof" (Appellants' Brief, pp. 4, 10; emphasis added).

2. Defendant would have the Court believe that Mr. Miller's only testimony on this issue was that there was a "slight incline or hump in the road" at the crossing (Appellee's Brief, p. 8). Quotation of the entire sentence discloses that Miller testified:

" . . . as the curve of the railroad went around that area there seemed to be elevation, you might call a super-elevation there, and the bottom of the trailer became lodged on the bed of the road" (J.A. 26; emphasis added).

3. Defendant argues (Brief, p. 8) "That this hump effect is indeed slight is corroborated by . . . ; (2) Miller's testimony that he did not remember noticing a hump there when he crossed the grade in his automobile 'a couple of years' ago; . . ." Miller's testimony reads:

"Q. When, if at all, had you previously been over this crossing? A. I don't recall. I don't believe I had been over it in a couple of years. I had never been with a piece of equipment" (J.A. 26).

* * * * *

"Q. Had you been across this crossing before in your own automobile? A. Years before I might have crossed it. It had been quite a while.

"Q. Do you remember seeing any hump when you crossed it in your own automobile? A. I wasn't looking for any hump, if I had crossed it at that time. I wasn't looking for a hump. If I had crossed it I possibly didn't notice it.

"Q. You don't remember whether you noticed it or not? A. I don't remember" (J.A. 40-41; emphasis added).

4. Defendant argues (Brief, pp. 8-9) that Miller's testimony to the effect that he was sitting high in the cab of his truck and did not see the hump shows the hump was insignificant. It is a simple physical fact that a change in the elevation or vertical contour of the road is best seen by one close to the surface of the road, and that such changes are more difficult to observe from a height. To illustrate, as one flies over the countryside in an airplane, the terrain below appears flat, and one is able to recognize only gross changes in elevation, such as are created by mountains or large hills.

5. Defendant states (Brief, p. 13) plaintiffs' evidence showed that "the only vehicles hwhich experienced difficulty were two extraordinarily long, low and heavily weighted tractor-trailer units." Defendant must have "overlooked" the testimony of Mr. Stancliff with respect to the difficulty he had with his automobile some two years before the accident, when his muffler dragged on the road bed while he was attempting to negotiate this crossing (J.A. 54).

B. The Defense Versus The Record - The Negligence of the Grade Crossing Watchman.

1. Defendant purports to seriously contend that under Maryland law, "the sole function of the watchman is to give notice of the approach of trains" (Brief, p. 14-15). The untenable nature of this position is manifest in defendant's own brief, if not from the defendant's own rules. To be logically consistent, defendant would be forced to the further preposterous contention that once the grade crossing watchman had given notice of the approach of a train, his duty to travelers had ceased; that when Miller was told a train was coming, after his equipment had become hung up, the watchman would have no duty to attempt to warn the train. The Maryland statute to which defendant alludes (Brief, p. 15), providing that the flagman is "to give timely notice to all persons using said crossing, of the approach of all locomotives or trains . . ." is certainly a minimum requirement, and does not relieve the watchman from his common law duty (and his duty under company rules) of acting as a reasonably prudent [watch]man with respect to realizing what equipment could safely negotiate his crossing, and warning approaching trains of obstructions on the tracks.

2. Defendant implies (Brief, p. 16) that the watchman could not take time to examine Miller's rig because, firstly, he was concerned with Stancliff coming from the opposite direction, and, secondly, was watching for approaching trains. The record belies both assertions. Stancliff testified that when he approached the crossing, the watchman had his back turned to him (J. A. 53).

"Q. Where was he [the watchman] looking? A. He was watching Miller approach the crossing.

"Q. Did he look at you at all. A. Not that I know of.

"Q. To your knowledge, did he keep his attention focused on Miller? A. To the best of my knowledge, yes."

Nowhere in the record can defendant point to testimony that the watchman was looking up the tracks for approaching trains before the Miller rig became stuck. It was clear, therefore, that the watchman did in fact look at the Miller equipment before it started crossing the tracks, but never attempted to warn Miller or take any precautions to determine whether the rig could safely cross. Instead, he invited Miller onto the tracks by waving him onto the crossing.

3. Defendant argues (Brief, p. 19) that its watchman was not "panic-stricken," although even the trial judge was impressed that "He [the watchman] was panic-stricken. The testimony shows that...." (J.A. 81). Notwithstanding defendant's assertions, there was substantial evidence that the watchman was panic-stricken. In answer to defense counsel, Miller testified (J.A. 41-42):

"Q. And you say that the watchman panicked at that point? A. I thought he did.

"Q. What did he do that made you think he panicked? A. Well, he seemed to wring his hands and just became terrified and from his outward appearance he seemed to me he was very stricken at the time.

"Q. Did he not immediately start up the track with his red flag in the direction in which the train was coming? A. He did not have his red flag with him. I think he run in the shack and got his red flags and then run up the tracks.

"Q. He did that immediately after the buzzer sounded? A. That I couldn't state."

4. Defendant argues (Brief, p. 19) that the rules of the railroad provide "that when a crossing is obstructed or unsafe for train movements watchmen must use a red flag by day, and a red light by night or when day signals cannot be seen." This attempted paraphrase does not state the rule. The pertinent sentence of Rule 400-N-23 of the Pennsylvania Railroad reads (J.A. 73):

"When the crossing is obstructed or unsafe for train movements they must use a red flag by day, a red light by night and when day signals cannot plainly be seen and when necessary, in addition, display lighted fuzees to stop movements on the track obstructed or unsafe" (emphasis added).

There are thus two situations when fuzees are to be used at times other than at night: (1) when day signals cannot plainly be seen (not, as defendant implies, only when day signals cannot be seen at all), and (2) in addition to day signals, when necessary. The facts of this case compelled the use of fuzees by the watchman, first, because, when the train was sighted 3/4 to 1 mile away, the flag could not be plainly seen, and, secondly, the train was moving too fast (estimates varied from 85 to 90 m. p. h.) to permit the watchman to get far enough up the tracks with his small red flag to give the train crew timely opportunity to see it and stop the train. The use of a fuzee was therefore "necessary."

5. It is urged by defendant (Brief, pp. 19-20) that "there is no evidence from which it could be found that a fuzee would have been a better signal" than a red flag and that there was "no evidence of the value of a fuzee as a warning device during the daytime" Defendant has apparently "overlooked" the following persuasive evidence. First, there is the testimony of defendant's own watchman that the fuzee gives off a "tremendous red glare" and "is to indicate danger" (J.A. 66). Second, the defendant's own rule clearly contemplates the use of fuzees in the daytime, as indicated above. Third, another of defendant's rules in evidence, Rule 35, indicates that fuzees were to be used in the daytime (J.A. 71). "The following signals will be used by flagmen: Day Signal: A red flag, torpedoes and fuzees. Night Signals: A red light, torpedo and fuzees." (Emphasis added) And lastly, the defendant's watchman testified as follows (J.A. 67):

"Q. Even in daylight wouldn't the use of a fuzee be very effective to give notice of danger or warning to a train? A. It is possible.

"Q. Isn't it not only possible, but isn't that most likely? A. I don't know.

"Q. It is a lot more effective at some distance than a red flag would be? A. I don't know

"Q. Is it your testimony that you don't know whether [a fuze] is more or less effective than a red flag? A. In the daytime I don't know.

"Q. Have you ever been instructed on that?
A. No."

It is suggested that since most of us have seen red flares in the daytime, as well as at night, while traveling on the highways, the court could take judicial notice of the fact that a red flare is a clearly visible warning of danger in the daytime. Defendant's watchman admits "it is possible" and then says, "I don't know." If he really did not know, then he was an incompetent watchman, and the railroad would be liable for the unfortunate consequences of this hiatus in his knowledge. (Although not set out as a separate act of negligence in plaintiffs' brief in chief, the inadequate training of the defendant's watchman was an issue in the case and was argued by plaintiffs. See Plaintiffs' Pre-Trial Statement, J.A. 10, and Brief, pp. 21-23).

6. Defendant overstates its case again when it says (Brief, p. 20) "there is no evidence as to how long it takes to light a fuze and how far up the tracks a fuze must be placed in order to give timely warning." But then defendant hastily "back-tracks" in the next sentence, and we are told that defendant's own watchman testified it would take "only a few moments" to set off a fuze (J.A. 66). The obvious import of defendant's own rule, cited above, is that the fuze is to be placed on the obstructed crossing and not far up the track. (The trial judge was apparently confused as to the difference between "a torpedo", which is ignited when placed under the wheels of a moving train, and a fuze, which is lit by hand and placed on the tracks to indicate danger (J.A. 69-70).

7. Defendant alleges there was not time enough for the watchman to have lit a fuze (Brief, p. 20). Defendant is attempting to carry water on both shoulders at the same time. Just three pages before, on page 17, defendant contends that a relatively long period elapsed between the time the trailer got stuck and the time of the collision. In footnote 11 (Brief, p. 17), defendant points out that Miller had time enough to try and free his unit by applying power to his engine two or three times, had time to get out of his truck and instruct Lindsay to unload the bulldozer -- all before the buzzer sounded. And further, that Stancliff, after seeing the trailer settle down on the tracks and the approach of the train, had time enough "to back his own truck, turn around and drive 100 feet from the crossing, get out and start walking back towards the crossing (J.A. 53)." Certainly defendant cannot, in view of its statements above, seriously contend there was not sufficient time for its watchman to ignite a fuze after the Miller rig became hung up, particularly where its own rules provide that fuzes are to be available for "immediate use" (J.A. 72).

C. The Defense Versus The Record - The Negligence of the Train Crew.

1. Defendant would have us believe black is white and vice-versa, depending upon which page of its brief we happen to be reading. On page 21, we are told "Appellant did not put in any evidence as to visibility conditions from the train" Then, on page 19, we are conveniently informed, "Miller had testified that when he approached the crossing visibility was good and he believed the sun was still out" (J.A. 24). By such legerdemain we are to believe that visibility from the crossing to the train was good, but from the train to the crossing was bad. From the evidence, the only conclusion a jury could draw was that the line of sight between the train and the crossing for 3/4 of a mile to a mile was clear, because Miller had testified that the train was 3/4 of a mile to 1 mile away when he first saw it (J.A. 30). The

logical inference, of course, is that the train crew could or should have seen the Miller equipment, at the same time.

2. Defendant then builds its house of cards on its assertion that "Lindsay testified, however, that he and Miller saw it [the train] simultaneously when it was at the Route 50 overpass (J. A. 51)," and argues that the photographs "clearly show this overpass is much closer to the crossing than three-quarters of a mile" (Brief, p. 24). But on what kind of foundation does this house of cards stand? Lindsay had testified at least two different times that he did not know whether Miller saw the train before he did and called his attention to it, or whether they saw it simultaneously (J. A. 46-47). And then defendant's counsel asked:

"Q. Who saw the train first -- you or Mr. Miller.

A. I stated the other day that I don't know whether I saw it first or he called my attention to it.

"Q. Do you think you saw it about simultaneously, the same time? A. That is right." [Emphasis added]

What did defense counsel mean by "about simultaneously"? Within 30 seconds? One minute? Two minutes? This is the foundation upon which defendant would have the court completely disregard the direct testimony that the train was 3/4 to 1 mile away when first seen. Additionally, the photographs alluded to by defendant are equally inconclusive.

Even assuming Lindsay's testimony was as defendant alleges, little weight should be accorded testimony of one person as to what another saw, as against a direct statement of the person who says what he saw. In any event, defendant's assertion that Lindsay's testimony is uncontradicted in this respect (Brief, p. 24) is completely reckless in the light of Miller's direct testimony (J. A. 30).

3. Defendant's mathematical gymnastics are as fallible as its logic. Boiled down to its essence, defendant's argument is that there was only 15 seconds between the time the train came into sight and the time of impact, and a train traveling at 85 m. p. h. could not be stopped in time. Apparently defendant has thus abandoned the trial judge's findings that the crossing could have been seen for at least 1/2 mile or more, and that if the engineer had started to slow down, he could have stopped the train and avoided the collision (J.A. 81).

In examining defendant's "mathematical facts" we find that defendant arrived at 15 seconds - - the keystone of their whole theory -- by taking the Lindsay estimate of 5 to 10 seconds, as the time that elapsed from the time he saw the train until he jumped, and adding another 5 seconds as the time elapsing between Miller and Lindsay jumping off and the collision. In the first place, defendant again completely ignores Miller's direct testimony that he saw the train when it was 3/4 to 1 mile away, and Lindsay's testimony that he is not sure whether he saw the train at the same time Miller did, or whether Miller called his attention to it (see discussion, supra. p. 12). In any event, it is unlikely that Lindsay saw the train at the same time as Miller, because he was busy with the controls of the bulldozer, trying to get the motor started. He was not looking for trains (J.A. 46-47).

Secondly, there is no testimony in the record as to the time lapse between Miller and Lindsay jumping off the rig, and the collision, and yet defendant would have the court cavalierly "add another five seconds." There is thus no record basis for defendant's ingenious mathematical Alice in Wonderland, and its theory must therefore fail as support for action below, required to be predicated upon a view of the evidence taken most favorably for plaintiffs. The only facts which a jury could have found from the evidence were that visibility conditions were good, that defendant's train was 3/4 to 1 mile away when first seen (J.A. 30,) that the train crew could or should have seen Miller's rig, and that the train could have been stopped in 2500-3000 feet (J.A. 64-65).

CONCLUSION

The desperate attempt to inject a false issue of contributory negligence into this case on appeal is nothing short of a "red herring." The record below indicates the Maryland State Roads Commission Regulations do not apply to county roads, the regulations bear no casual relationship to the accident, and, in any event, constituted a question of fact for the jury. Additionally, upon analysis of the distorted and myopic presentation of the record facts by the defense, it is clear there was substantial evidence of the negligent maintenance of the crossing, of the negligence of the watchman in that he failed to warn Mr. Miller of the hazards of the crossing, and failed to use the means available for warning the train of the obstruction, and of the negligence of the train crew in failing to see the obstruction which was there to be seen and failing to avoid the accident by stopping their train, all of which proximately caused the collision. At the very least, a jury should have been permitted to resolve these issues.

Respectfully submitted,

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